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IN THE
Supreme Court of the United States

NO. **211**
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W. R. KELLEY, *Petitioner*

VS.

UNION TANK AND SUPPLY COMPANY, *Respondents*

**PETITION FOR WRIT OF CERTIORARI FROM THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE FIFTH CIRCUIT AND BRIEF IN SUPPORT
THEREOF**

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UNION TANK AND SUPPLY COMPANY, *Respondents*

**PETITION FOR WRIT OF CERTIORARI FROM THE
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TO THE HONORABLE FRED M. VINSON, CHIEF
JUSTICE OF THE SUPREME COURT OF THE
UNITED STATES AND THE HONORABLE ASSO-
CIATE JUSTICES OF THE SUPREME COURT OF
THE UNITED STATES.

Your Petitioner, W. R. Kelley, respectfully prays for
the issuance of a Writ of Certiorari to the Circuit Court
of Appeals for the Fifth Circuit to review the judgment
of the Court entered on May 7, 1948, reversing and re-

manding the judgment of the United States Circuit Court of Appeals for the Fifth Circuit and holding that the trial court should have granted the respondent's Motion for an instructed verdict, with Mr. Justice Holmes dissenting and holding in his dissenting opinion that the matter was properly submitted to the jury, the case being numbered 12,211, "Union Tank and Supply Company, Appellant, vs. W. R. Kelley, Appellee," on the docket of the said Court.

The certified transcript of the record in this case, including the proceedings in the said Circuit Court of Appeals is presented herewith in accordance with Rule 38 of this Court.

I.

SUMMARY STATEMENT OF MATTER INVOLVED

The majority opinion of the Fifth Circuit does not correctly present a true statement of the facts, the only correct portion of the opinion being that the plaintiff did allege himself to be an employee of one Bruce Wimberly, an independent contractor, and plaintiff did sue as an invitee of the defendant for damages for personal injuries sustained while unloading from a box car sheets of steel belonging to the defendant. The fact that the majority opinion is erroneous is well shown in the brief paragraph in which they attempted to set forth plaintiff's allegations of negligence as follows:

"The claim was that defendant was liable because defendant's contract with Wimberly called for the performance of an inherently dangerous work, unloading, in the night-time, without adequate lighting, a box car full of heavy steel sheets, which, to defendant's knowledge, but not to plaintiff's were so stacked as to be liable to fall, and defendant had failed to warn plaintiff of the grave dangers attendant on doing the work."

A much better version of the claims of negligence is set forth in the Brief For Appellant as filed in the Circuit Court, in which the Appellant's counsel recognized that we relied upon the following grounds of negligence:

"(a) That Joe Head, Foreman for Crawford Tank & Supply Company, discovered the dangerous and perilous condition of appellee and failed to warn appellee of his grave danger.

(b) That appellant negligently failed to furnish appellee a reasonably safe place in which to work, and negligently failed to furnish adequate lights in the box car.

(c) That the unloading of the steel in the night-time without adequate lights, when the steel, to appellant's knowledge, had been dangerously and carelessly stacked and liable to fall, was so inherently dangerous that it was the duty of the appellant to give timely warning, to furnish adequate light, and see that said steel was carefully stacked and that appellant negligently failed to perform such duties.

(d) That the appellant was negligent in that its agent, Joe Head, directed Bruce Wimberly (the independent contractor) to unload said car of steel in the night-time when Head knew at the time of giving said order that the light in the car was inadequate, and that the steel in the car was negligently stacked.

(e) That appellant discovered the perilous and dangerous position of the appellee, and then and there knew that the appellee was inexperienced, and that said Bruce Wimberly was inexperienced and incompetent to unload said steel and knew that the supports which had been attached to said sheets of steel to keep them from falling had been removed and knew that the work was being performed in the night-time without lights, and that appellee would be injured, or probably injured, and that Head, after knowledge of appellee's position of danger, failed to warn appellee of his danger and failed to warn appellee that he had removed the supports from said sheets of steel and failed to procure adequate lights, and that after Head knew of appellee's perilous position in the foregoing respects, and when there was still plenty of time for Head to act and perform the above steps and to secure adequate light, he failed to exercise any of the above precautions and negligently ordered the said Bruce Wimberly to continue unloading the sheets of steel until the car was finished.

(f) That each of the alleged acts of negligence was the proximate cause of appellee's injuries and damages."

There was no question but that the plaintiff was seriously injured to such an extent that he suffered an abcessed lung, together with the fact that his intestines were destroyed to such an extent that his bowels must forever move from an improvised opening or fistula in his stomach and that the plaintiff would permanently suffer great mental and physical pain and anguish, as well as total and permanent disability.

A portion of the testimony that is not set forth or taken into consideration by the majority opinion of the Fifth Circuit Court is set forth as follows:

"The record shows that Kelley was not warned of his danger by Mr. Head. (R. Pg. 47) Furthermore, Mr. Wimberly had not warned Kelley of his danger. (R. Pg. 47) Appellee Kelley had not noticed anything unusual about the box car or the conditions in the box car. (R. Pg. 46) The plaintiff had never before unloaded any steel of this particular type and he testified that since he had been requested to move the steel by Mr. Head, who had been working in the car, that he presumed that it was safe to get in the car and take the steel out. (R. Pg. 49) Plaintiff's employer, Wimberly testified that the cause of the accident and the reason the steel fell upon Kelley was that the support which held the steel up broke. (R. Pg. 197.) Plaintiff's employer also admitted that on the former trial of the case he had testified by deposition that Head had not given Plaintiff any warning whatsoever as to his danger or any instructions as to how the work was to be performed and that in detailing the con-

versation between him and Mr. Head he made no mention of the fact that Mr. Head had given any warning to him or his men to be careful in the performance of the work contracted for (R. Pgs. 194 and 195) The appellant's representative, J. O. Head, who was in charge of the job for the appellant, testified that he, himself, had torn out supports, braces and crating and that he failed to tell Mr. Wimberly or Mr. Kelley that he had done this; that the effect of tearing the crates loose naturally weakened them more and that when he took the supports out they were easier to fall. (R. Pg. 107.) He also testified that he did not know why he didn't tell Wimberly about this but that he didn't (This latter sentence was stricken by the trial court—R. Pg. 107.) The witness, Head, also admitted on cross-examination that he knew that it was dangerous work. (R. Pg. 125.) Head also admitted upon the trial of this cause that there were ways of lighting up the box cars by lanterns or flash lights so that sufficient light would be in every part of the car and that the purpose of lighting up the car would be that it would give a man light to see how to catch hold of anything and to see the danger of anything slipping or falling. (R. Pgs. 139 and 140.) Head admitted that he knew that a man who wasn't experienced wouldn't notice the staves being set too straight up and down. The following question and answer on this part is important:

'Q Any man with ordinary eyes could see that that stuff was in a dangerous condition, as you have described it there, is that right?

A. After I tore these supports loose, crating I straightened up what had already been torn

loose from the back end, I straightened them up, took them off. When they wasn't used to unloading it would not. A man that wasn't experienced wouldn't notice it being set too straight. The staves were set too straight up and down.

Q. But you set them up there in that position?

A. Partly.' (R. Pgs. 136 and 137.)

Head admitted that he did tell plaintiff's employer, Wimberly, that he wanted the men to continue working until they finished unloading the car. (R. Pg. 105.) That when he went by around 7:00 or 7:30 P. M., that the men were unloading the car, including plaintiff; that at that time it was beginning to get dark in the car and that he noticed that they did not have any lights in the car and that he did not tell Wimberly to get any lights for the car. This was in response to the following question: 'Q. Did they, to your knowledge, or not, work during the night-time?' " (R. Pg. 106)

II.

JURISDICTION

(1) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U. S. C., Sec. 347.)

(2) The judgment of the Court of Appeals was rendered in a civil action.

(3) The date of the judgment to be reviewed is May 7, 1948.

Petition for Rehearing filed by respondents was denied June 7, 1948.

(4) It is believed that the following cases sustain the jurisdiction of this court:

West v. American T. & T. Co., 311 U. S. 223, 85 L. Ed. 139;

Story Parchment Co. v. Patterson Parchment Paper Co., et al, 282 U. S. 555, 75 L. Ed. 544;

Galloway v. United States, 319 U. S. 372, 87 L. Ed. 1458;

Cities Service Oil Co. v. B. P. Dunlap, et al, 308 U. S. 208, 84 L. Ed. 196;

Griffin v. McCoach, 313 U. S. 498, 85 L. Ed. 1481.

(5) The decision of the Court below conflicts with the decisions of other Circuit Courts of Appeals on similar matters and said Circuit Court has decided important questions of local law in a manner in conflict with the decisions of the Texas Courts, and said Circuit Court has decided important questions of general law in a manner that is conflicting with the weight of authority; and the opinion of the Circuit Court constitutes such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's

power of supervision. Wherefore under Rule 38 (5) (b) of the Revised Rules of the Supreme Court of the United States, this discussion may be reviewed by this Honorable Court.

In *Galloway v. United States*, above cited, 319 U. S. 372, 87 L. Ed. 1458, the Court rendered a Writ of Certiorari in a case involving a question as to whether the evidence was sufficient to show when the plaintiff's total and permanent disability began. The majority of the Court held that the evidence was insufficient, Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy dissenting.

In a very enlightening opinion, Mr. Justice Black demonstrates that the Supreme Court should grant Writs of Certiorari in cases where the right of trial by jury has been denied, this right having been one guaranteed under the Seventh Amendment to the Constitution. We cannot but quote from this most learned opinion since it demonstrates the duty of this Honorable Court to grant this Writ of Certiorari. In that case, Justice Black said in part as follows:

"The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is substantial evidence to support the claim of the plaintiff in an action. If a single witness testified to a fact sustaining the issue between the parties, or if reasoning minds might reach different conclusions from the testimony of a single witness, one of which would substantially support the issue of the contending

party, the issue must be left to the jury. Trial by jury is a fundamental guaranty of the rights of the people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials.

The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the judge or the jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights, may be peculiarly difficult, for here it is our own power which we must restrain. We should not fail to meet the expectation of James Madison, who, in advocating the adoption of the Bill of Rights, said: 'Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights: . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of right.' So few of these cases come to this Court of the District Courts and the Circuit Courts of Appeal and the primary custodians of the Amendment. As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances."

III.

PRINCIPAL QUESTIONS INVOLVED

The majority opinion in which it is held that the trial court should have instructed a verdict for the respondent is clearly erroneous in that as said by Judge Holmes in his dissenting opinion, "The Fifth Circuit Court has decided too many questions which should have been left to the jury." According to Mr. Justice Holmes, these are the principal questions involved: We quote from Justice Holmes' opinion as follows:

"My failure to concur in the opinion of the majority is due to the fact that too many questions have been decided therein which I think should be left to the jury upon another trial. I think the court below did not err in refusing to direct a verdict for the defendant. There are two grounds that might warrant re-submission of this case to a jury: first, whether in the absence of warning, the work at night, without adequate lighting, was inherently dangerous; second, whether the defendant interfered with the independent contractor by giving orders as to the details of carrying on the work, especially by directing that the work be continued at night until the car was unloaded. 27 Am. Jur., Sec. 31, p. 510.

Because the plaintiff had worked eight hours before being injured, did not, in my opinion, excuse the original negligence, if any, of the defendant. A workman engrossed upon his task may be slower to realize his peril than if he had been forewarned. He was at least entitled to the warning in advance, so

that he could determine for himself whether he would undertake the dangerous work. The questions of inherent danger, failure to warn, intermeddling or interference, assumption of risk, contributory negligence, and other controverted issues upon this record are peculiarly for the jury."

In our Brief to be filed in support of this petition, we will go into this matter more fully but we think, in addition to the matters suggested by Judge Holmes, that the evidence clearly raised an issue of fact as to the negligence of the respondent's representative, Head, in creating an unsafe condition which was the proximate cause of the injuries suffered by petitioner.

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The opinion of Mr. Justice Black in the Galloway case, supra, clearly demonstrates the necessity of this Honorable Court granting this writ. The dissenting opinion of Mr. Justice Holmes is clearly correct and in this case in which a man is seriously and permanently injured and in which the Fifth Circuit Court has, by its majority opinion, taken from him a \$32,000.00 judgment and in which the fact findings as made by a jury which had sufficient support in the evidence, and in which the Fifth Circuit in its majority opinion has seen fit to disre-

gard said evidence, the findings of the jury should be given full force and effect by this Honorable Court by granting this writ and affirming the judgment of the United States District Court in and for the Western District of Texas, to-wit, the Honorable R. E. Thomason.

The majority opinion, if allowed to stand, will deny recovery to all employees of independent contractors who are injured by negligent third parties in cases where the performance of inherently dangerous work is involved. This is a most serious matter because the Fifth Circuit has not only incorrectly held that the rules of law pertaining to inherently dangerous work did not inure to the benefit of the servant of the contractor, but the effect of this opinion will be to deprive thousands of such employees of their legal rights in such cases. In Texas, the compensation insurance carrier has the right to intervene and to recover the amount paid by it as compensation against the negligent third party. The effect of this doctrine will be to discourage the prompt payment of compensation in cases many times where compensation is seriously needed due to the fact that the insurance carrier will be deprived of the right to the monies paid by it as compensation against the negligent third party.

In addition to this, the opinion in this case clearly conflicts with another opinion of the Fifth Circuit Court and one to which we failed to call to the attention of the Fifth Circuit Court in any Briefs heretofore filed before it,

same being the case of *Pitman et al v. Schultz*, 125 F. (2) 82. As a matter of pure coincidence, the opinion was by Judge Hutcheson and Justice Holmes was also a member of the Court participating in the decision. The case is clearly in point in support of the position assumed here by the petitioner in response to the right of the petitioner to recover because of the respondent's representative, Head, ordering them to perform the work in the night-time in an unsafe way and without adequate lighting. The opinion speaks for itself and coming from Judge Hutcheson is a complete answer to the erroneous reasoning indulged in by him in the case at bar. We quote from Judge Hutcheson's opinion as follows:

"The suit was for damages for personal injuries. The claim was that plaintiff suffered them while, and because of, attempting to carry out an order defendant had negligently given him requiring the performance of work in an improper and dangerous way.

The defenses were (1), that the work in which the plaintiff was engaged was one of construction where the work conditions were subject to constant change and the risks incident thereto were therefore assumed by him as a part of the necessary conditions under which it had to be done; and (2), that his injuries were not the result of any negligence on the part of defendant, but of his lifting a weight which upon the undisputed evidence, was not too heavy for him and if it was beyond his strength, this was a matter better known to him than to de-

fendant and the risk of which he assumed. There was a trial of the jury and a verdict for plaintiff. Defendant is here complaining of the refusal of his motion to direct a verdict and, as on the weight of evidence, of the following charge: 'If you should believe that any witness has wilfully, knowingly and corruptly sworn falsely to any material fact in the case, then you may disregard the testimony of any such witness altogether.'

(1) Appellant's first point that the injury occurred on a construction job and as the result of necessarily changing conditions of which plaintiff assumed the risk, misapprehends the nature and basis of plaintiff's claim and is without support in the record. Plaintiff's injuries were not sustained as the result of his voluntarily taking a dangerous course in the midst of changing conditions on the construction job, within *City of Tupelo v. Payne*, 176 Miss. 245, 168 So. 283. They resulted as they did in *Norton v. Standard Oil Co.*, 177 Miss. 758, 171 So. 691, and in *Carey Reed Company v. McDavid*, 6 Cir., 120 F. 2d 843, 844, from the failure of the defendant to furnish a safe way to do the work, its positive acts in requiring plaintiff to do it in an unsafe way. For the reason that this is so, appellant's second defense that the cause of the injury was merely a voluntary overlifting by plaintiff and therefore not actionable within *Harris v. Pounds*, 185 Miss. 688, 187 So. 891, is equally untenable. What caused the injury here was not the voluntary act of plaintiff in overlifting. It was the awkward posture and position in which plaintiff was required by the peremptory order of his foreman to place himself in handling the load, coupled with the insufficient force with which, over

his protest he was required to do the work. The case is ruled by Natural Gas Engineering Corp. v. Bazor, Miss. 137 So. 788; Jefferson v. Denkmann Lbr. Co., 167 Miss. 246, 148 So. 237; Hardaway Contracting Co. v. Rivers, 181 Miss. 727, 180 So. 800; Montgomery Ward & Co. v. Lindsey, 6 Cir., 104 F. 2d 882; Gulf & S. I. R. Co. v. Bryant, 147 Miss. 421, 111 So. 451, 52 A. L. R. 901; Goodyear Yellow Pine Co. v. Mitchell, 168 Miss. 152, 149 So. 792, 150 So. 810; Everett Hardware Co. v. Shaw, 178 Miss. 476, 172 So. 337, 173 So. 411."

WHEREFORE, your petitioner prays that a writ of certiorari issued under the seal of the Supreme Court of the United States directed to the United States Circuit Court of Appeals for the Fifth Circuit, demanding that Court to certify and send same to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Fifth Circuit had in this cause, numbered and entitled on the docket, "No. 12,211, Union Tank And Supply Company, Appellant, vs. W. R. Kelley, Appellee," that this cause may be reviewed and determined by this Court, as provided for by the Statutes of United States and that the judgment of the said United States Circuit

Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

.....
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A copy of this Petition for Writ of Certiorari and Brief in Support thereof has been furnished Mr. Chas. C. Crenshaw, Sr., of Lubbock, Texas, Attorney for Respondent.

.....
JOHN J. WATTS

IN THE
Supreme Court of the United States

NO.

W. R. KELLEY, *Petitioner*

vs.

UNION TANK AND SUPPLY COMPANY, *Respondents*

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

I.

JURISDICTION

The grounds of jurisdiction stated in the Petition, which are printed in this Brief, will suffice, and for the sake of brevity will not be here reprinted.

II.

STATEMENT OF THE CASE

The facts pertinent of the question presented are stated in the petition and in the interest of brevity are not repeated here.

III.

SPECIFICATIONS OF ERROR

The specification of error as made in the Motion For Rehearing and filed before the Fifth Circuit Court will be the specification of error relied upon here. We will set out the entire Motion For Rehearing since the argument made in connection with specification of error is very brief and more fully amplifies and explains the erroneous action of the Fifth Circuit Court and we feel that it will amplify and shorten the work of this Honorable Court if this is done:

1.

"That the majority opinion of the Fifth Circuit Court is in error in that it assumes that the danger herein was obvious in that this assumption ignores the testimony of Head that he had placed the staves of steel in such a position that they gave a false appearance of safety, and we do not see how it can be stated with accuracy by this Honorable Court that the situation was as well known to Kelley as it was to Head, and in this connection,

appellee respectfully submits that the following assumption of fact is erroneous when in the majority opinion the court stated on Page 6, as follows:

"He, therefore, saw and knew everything that could have been told to him, that if the sheets were straightend up and swung over toward the north wall of the car, their weight, configuration, and size

were such that if unsupported they would be bound to fall. There was nothing then in the work he was doing and the situation under which he was doing it which was not as fully known to him as to Head, nothing in the work that was inherently dangerous if it was done with reasonable care for the safety of the worker."

The trouble with the above statement is that no one told Kelley that the sheets had been straightened up and were standing too much on edge. Due to their grooved appearance, Kelley did not know that these supports had been removed and the sheets had been straightened back by Head so as to give a false appearance of safety. Head knew that this was dangerous to an inexperienced worker and yet failed to warn Kelley. The sheets, due to their grooved appearance, appeared to be leaning in the opposite direction from which Kelley was standing and we do not see how the Fifth Circuit Court can make such a statement as the foregoing as a matter of law.

2.

The Fifth Circuit Court erred in the majority opinion in holding as follows on Page 8 of the opinion:

"As to the first exception, there is no evidence whatever that Head, who for defendant employed Wimberly, plaintiff's employer, in any manner interfered with the contractor in the discharge of his work. The fact that he told Wimberly that the steel must be gotten out that night was not an interfer-

ence with the contractor in the doing of the contracted work. It was merely the expression of a desire which was neither unlawful nor unreasonable. It imposed no duty whatever on the owner, to provide lighting or other means to do the work safely. This was the duty of the contractor, the failure to perform which was the negligence of the contractor, the very thing that an owner is not liable to the contractor's servants for."

We do not know how the learned author of this opinion who cited Section 414 of the Restatement of the Law of Torts as one of the supporting authorities in the *Amacker v. Skelly Oil Co.* case could have thus decided that said Section was not the law of the land. The above statement of the majority opinion is absolutely in conflict, it is most respectfully submitted, with Section 416, styled—Work Dangerous in Absence of Special Precautions.

"One who employs an independent contractor to do work, which the employer should recognize as necessarily requiring the creation during its progress of a condition involving a peculiar risk of bodily harm to others unless special precautions are taken, is subject to liability for bodily harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions."

We do not understand how the evidence that Head directed the contractor to continue working in the nighttime without lights can be held not to constitute an inter-

ference with the contractor's work within the meaning of 27 Am. Jur., Sec. 31, Pgs. 510-511, which Section is quoted by Mr. Justice Holmes in his dissenting opinion wherein it is said:

"If the employer is actually present and directs the commission of a wrongful or negligent act, obviously he is liable, regardless of the relation between him and other persons."

The Fifth Circuit Court's majority opinion says that the contractor was guilty of negligence in failing to furnish adequate lighting but, under this statement from Am. Jur. as well as from the above Restatement of the Law of Torts, this does not prevent the Union Tank and Supply Company itself from being liable to the employee.

3.

The majority of the Court erred in the following statement in the majority opinion in holding as follows on Page 9 of the opinion:

"Neither is plaintiff any better situated on the breach of duty to plaintiff as invitee to exercise ordinary care to furnish him a reasonably safe place to work. The governing rule here is thus set out in 23 Tex. Jur., Sec. 21, p. 568:

"The employer is under a duty to guard the servants of the contractor against any dangerous condition known to him but not the workmen. But as against open, obvious and apparent dangers, known to the workmen, the employer or owner of the premises is under no obligation of protection. Nor may he be held responsible for an injury caused by transitory conditions incident to the progress of the work * * *"

As shown by the evidence of Kelley, note 4, *supra*, the injury he sustained was 'caused by transitory conditions incident to the progress of the work.' These conditions were created by him in moving the other plates and in pulling the particular piece free from its nail. The dangers arising out of these conditions, that a heavy piece of steel might in handling be caused to come off balance and fall if not supported, were open and obvious. They had been seen by, known to, and avoided by him for the eight hours that he had been working, some six of them in full daylight."

To begin with, the learned author of the opinion in the Amacker case, who is also the author of the majority opinion in this case, laid down the rule in the Amacker case that the case of *Kuptz v. Soltitt*, 88 F. (2d) 532, "does not apply to this case where the work is static and precautions against injury from it can be easily taken."

The majority of the Court errs in assuming that the particular piece that fell upon Kelley fell as a result of his freeing it from the back end. This question of proximate cause or as to what causes an accident to happen is always a question for the jury where the evidence is in conflict and there is room for reasonable minds to differ as to whether the steel fell due to the dangerous manner in which it had been stacked by Head, or due to a support breaking as testified by Wimberly (R. 197). There is no room for saying under any of the evidence that the removal of a nail by Kelley in and of itself caused the steel to fall, since the undisputed testimony of Kelley was that *the staves were leaning the same way from the beginning of the work up until the time that the entire stack actually fell and the court has to assume conditions that were not supported by the evidence* and there is nothing in note 4, to justify this assumption. If the court refers to the testimony of Kelley that as he took out the sheets he could see that they were leaning, we would like to quote this testimony of Kelley's and call it to the attention of the court:

"Q. What did you see there concerning the stack?

A. The steel was leaning against the car, and I had no idea it could be dangerous from the way it was stacked.

The steel staves were leaning against one wall. As I had been told it had to be moved I presumed it was safe to get in and take the steel out.

Q. Had you ever unloaded any steel before?

A. Of that particular type, no, sir.

Q. You never had moved any tank staves?

A. No, sir." (Record Pgs. 48-49)

The majority opinion utterly ignores the following testimony of Kelley when they assume that the injury here was caused by transitory conditions incident to the work:

"Q. You saw, as you pulled these sheets out one by one, you saw that the balance in the box car there was gradually leaning, didn't you?

A. They were leaning the same degree from start to finish.

Q. Leaning the same degree from start to finish? All right. You could and did see they were leaning towards one side?

A. Towards the south, yes, sir.

Q. And you observed that condition of those things there for several hours, didn't you, as you worked along?

A. They were leaning to the south, and I judged they would be safe in that manner." (Record Pg. 68)

It is too apparent that the collapse of the entire structure was caused by the act of Head in setting the staves

of steel too much on edge, something that could not be detected by an inexperienced man such as Kelley, something that was not obvious to Kelley. This was the evidence of Head, who admits that his knowledge was superior to that of Kelley who knew of a dangerous condition existing in the box car before the appearance of safety was given same, and a man who was thoroughly experienced with and had knowledge of the danger of the work. For instance, Wimberly, the experienced contractor, saw nothing wrong with the manner in which the steel was stacked. (R. 192) For the majority, under such circumstances in the majority opinion, to assume that the injury was caused by transitory conditions as distinguished from the failure of Head to warn Kelley and as distinguished from the negligence of Head in ordering that the work be done in the nighttime, is beyond our comprehension, and we respectfully submit that the jury was entitled to consider this evidence when his conflicting testimony presents issues of fact for the jury.

In cases where materials have been negligently stacked in Texas, the danger has never been held to be open and obvious and this Honorable Court overrules such cases without a written decision as *Memphis Cotton Oil Co. v. Gardner*, 171 S. W. 1082, and *City of Beaumont v. Silas*, 200 S. W. (2d) 695. If this opinion stands one can never recover in cases where materials have been negligently stacked.

The Court erred in holding in its majority opinion as follows, from Page 9 of the opinion:

"Nor can plaintiff avail himself of the exception dealt with in Sec. 22, Work Inherently Dangerous. In the first place, as pointed out in *Humble Oil & Refining Co. v. Bell*, 180 S. W. (2d) at p. 975, quoting 14 R. C. L. p. 95:

'The rule imposing liability on the employer is for the protection of third persons, not for the protection of the contractor's servants, and the latter cannot hold the employer responsible * * * solely upon the theory that the work * * was intrinsically dangerous'."

To begin with, the Bell case, as to this portion of the opinion, has incorrectly construed the law of Texas. The Supreme Court of Texas refused the Application for Writ of Error in the Bell case for want of merit. This means, of course, under Texas law that the El Paso Court had incorrectly declared the law in many respects. Upon motion for rehearing of the Application in the Bell Case, the Supreme Court of Texas in a written opinion reported in 181 S. W. (2d) 569, and gave the reason why the Writ was refused and this Writ was entirely predicated upon the proposition that Bell was an employee of Humble and hence, could not sue at common law. Judge Alexander used this language:

"The defendant, Humble Oil & Refining Co., was a subscriber under the workmen's compensation law and carried workmen's compensation insurance for the protection of its employees, and consequently, plaintiff's exclusive remedy against said defendant for the injury sustained in the course of his employment was under the workmen's compensation law. He could not maintain an action against said defendant for damages for personal injuries sustained by him in the course of his employment caused by the ORDINARY NEGLIGENCE OF SUCH DEFENDANT."

The above opinion shows that the Supreme Court of Texas recognized that the Humble Oil & Refining Co., was guilty of negligence toward Bell and hence, it shows that before the Humble could be guilty of ordinary negligence toward Bell, it would have to be assumed and believed that as a matter of law that a duty was owed by Humble to Bell. When all of the facts are considered, it is clear that the Supreme Court of Texas would have affirmed a recovery in the Bell case had Bell not have been a special employee of the Humble. The view taken by the El Paso Court is also repugnant to and in conflict with the view adopted by the authors of Texas Jurisprudence who stated as follows in 29 Tex. Jur. pg. 435, Sec. 257:

"Independent contractors and their servants are in the position of invitees as regards the use of the general employers premises, and are third persons as regards the master's liability for injury."

The learned author of A. L. R. in Vol. 23, pg. 1133, criticizes such a doctrine as was announced in the Bell case and such a doctrine as was adopted by this Honorable Court in the majority opinion in this case. Vol. 23, pg. 1133 is as follows:

"The broad theory has also been propounded that the doctrine which imposes upon the principal employer an enlarged liability in respect of inherently dangerous work *does not* INURE TO THE BENEFIT of a *servant of the contractor*. THE REASONING BY WHICH THIS THEORY WAS SUPPORTED IS FAR FROM SATISFACTORY. Its unsoundness seems to be conclusively indicated by the consideration that, so far as the principal employer is concerned, the servant of a contractor is a member of the public, and as such entitled to enforce his remedial rights on the same footing as other persons belonging to that category."

6.

The Fifth Circuit Court erred in its majority opinion in holding on Page 10 as follows:

"But in the second place, and more importantly, as pointed out in Section 22, and the cases cited by it, the 'intrinsically dangerous' exception does not apply to dangers from obvious risks connected with ordinary tasks, such as construction, loading and unloading, especially where, as here, special skill was not required to avoid injury but only the exercise of ordinary care. Cases where it typically applies are cases of 'unusual perils' such as those in the cases

cited and relied on by appellee, dangerous gas and oil tanks, dangerous electric wires, etc."

The majority opinion again we respectfully submit, is in error in stating the Record. The leading case that we relied upon on inherently dangerous work was the Texas case of *Cameron Mill & Elevator Co. v. Anderson*, 87 S. W. 282, which was simply a case involving ordinary manual labor in which no special skill was required but in which they held that the ordering of the digging of a ditch in a public thoroughfare without leaving lanterns or warning signs to show the presence of the ditch was inherently dangerous upon the grounds as stated by the court through Judge Gaines:

" * * * Ordinarily, we know that the principle of respondeat superior does not extend to cases of independent contracts, but it is not alone upon this doctrine that we predicate liability. Indeed, it may be doubted if the doctrine of respondeat superior has any application. Appellant is not the superior of McFadden in the sense that it had any control over the men or agencies employed in the work, but its liability rests upon the broad ground that IT CANNOT KNOWINGLY SET IN OPERATION CAUSES DANGEROUS TO THE PERSONS OF OTHERS WITHOUT TAKING ALL REASONABLE PRECAUTIONS TO ANTICIPATE, OBVIATE, AND PREVENT SUCH PROBABLE CONSEQUENCE, * * * (78 S. W. 8)

The majority opinion ignores such Texas cases relied upon by appellee such as *Continental Paper Bag Co. v.*

Bosworth, 215 S. W. Pg. 126, the facts being, briefly, that a paper bag company was under agreement to furnish space and machines with which independent contractor was to do printing, and they furnished a defective saw machine permitting hot metal to fly about, and a totally inadequate space requiring press to be placed so near saw that press feeder was in constant danger, a danger which the company had knowledge of and could have anticipated, the company was guilty of actionable negligence and was liable for injury to press feeder from metal from saw although the plaintiff was an employee of an independent contractor and though such contractor had control of both machines. The court's charge was as shown on Pg. 129 of the opinion:

"Likewise, if an original employer or owner, pursuant to agreement with a contractor, should furnish the place and a machine or machines to be used in doing the work which the contractor is engaged to perform, and if the work done at such place and with such machine or machines, as contemplated to be done, should be so inherently dangerous or intrinsically dangerous that injury would probably be occasioned thereby to the contractor's employee or employees in the course of their service in doing such work, unless precautions were taken, then it would be the duty of the original employer or owner to such employee or employees to exercise ordinary care to take such proper precautions, although the contractor might also be under duty to them to take some necessary step or steps to avoid the danger."

The above two cases are cases in which it might be contended that the dangers were obvious but this did not prevent the application of the inherently dangerous rule and we respectfully request this Honorable Court to consider these two leading Texas cases and we respectfully insist that they utterly show that the opinion of this Honorable Court is erroneous and that the dissenting opinion of Mr. Justice Holmes is right as rain when he holds that the work, when it is to be considered that it was to be performed in the nighttime and plaintiff was in constant danger from a condition created by Head, that the work was inherently dangerous.

7.

The majority of the Court erred in holding in substance on Pg. 10 of the opinion that in the Amacker case, Amacker's relationship was not that of an invitee. It was only as an invitee that Amacker's widow could have recovered anything. There is no twilight zone in this matter. One is either a special employee or an invitee. If a special employee, recovery cannot be had under the common law and this Honorable Court has by virtue of this opinion repudiated the holding in the Amacker case.

The majority of the Court erred in holding in substance on Pg. 11 of the opinion as follows:

"The only danger to plaintiff arose out of the way and manner in which he did the work, a danger

which he created and which was completely obvious to him.'

We say that there is evidence in this case showing that the danger here created was first created as suggested by Mr. Justice Holmes in his dissenting opinion by the failure of Head to warn Kelley of his danger. Kelley was at least entitled to this warning in advance so that he could determine for himself whether he would undertake the dangerous work. Second, the stack fell, or at least it was an open question for the jury, under the evidence, from Head's acts in setting the staves of steel too straight up so as to give a false appearance of safety to an inexperienced man, and third, the order to do the work in the night-time was a danger created by Head and Head only and plaintiff might have avoided the injury had the lights been adequate so that he could have realized sooner that the staves were getting to be in an unsafe condition.

8.

The majority of the Court erred in holding that the duty of a master to furnish a servant a safe place in which to work was not the same duty of the owner of premises to an invitee. There are no cases supporting this Honorable Court in this statement of the law that appellee's counsel has been able to find. There is no logical basis, we respectfully suggest, supporting such a distinction and the distinction made by this Honorable Court is

clearly in conflict with the decision of the Supreme Court of Massachusetts in *Carpenter v. Sinclair Refg. Co.*, 129 N.E. 383."

IV.

STATEMENT

On Page 134 of the Record, the following questions were asked of the witness, J. O. Head:

"Q. And this 2x6 at the west end, the staves were attached through the holes in the flange by a nail, weren't they?

A. Had been.

Q. Had been?

A. Yes, sir.

Q. And that 2x6 was about, down about a foot from where the top of the staves, were they?

A. No, sir.

Q. How?

A. No, sir.

Q. Where was it?

A. Near flush with side of the stave, on the end of it.

Q. You are sure of that?

A. Yes, sir.

Q. AND YOU CRAWLED OVER THESE STAVES AND GOT UP OVER THERE AND TOOK THAT 2x6 OUT OF THE WEST END OF THE BOX CAR?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. You just pulled all of those nails, you say, loose?

A. Part of them was already pulled loose.

Q. Those that were not pulled loose you pulled them loose?

A. Yes, sir.

Q. AND TOOK THAT 2x6 OUT OF THERE AND LATER TOOK IT OUT OF THE BOX CAR, IS THAT RIGHT?

A. YES, SIR."

On Page 136 of the Record, Head further testified in part, as follows:

"Q. THESE STAVES WERE NOT IN CRATES, WERE THEY, NEVER CAME IN CRATES?

A. YES, SIR, CRATING, WITH SUPPORTS OR CRATING.

Q. WHAT CRATING ARE YOU TALKING ABOUT?

A. 4x4 UP IN FRONT.

Q. HOW MANY?

A. ONE AT THE TOP OF THE STAVE AND ONE AT THE BOTTOM ON THE FLOOR AND AT THE END OF THE CAR WOULD BE A 2x6 GENERALLY."

AUTHORITIES

Amacker vs. Skelly Oil Co., 132 F. (2) 431;

American Pacific Whaling Co. vs. Kristensen, 93 F. (2) 17;

American Stores Co. vs. Murray, 87 F. (2) 894;

Anderson, et al vs. Southern Ry. Co., 20 F. (2) 71;

Boal vs. Electric Storage Battery Co., (3rd Cir.) 98 F. (2) 815;

Cameron Mill & Elevator Co. vs. Anderson, 87 S.W. 282;

Carpenter vs. Sinclair Rfng. Co., 129 N.E. 383;

City of Beaumont vs. Silas, 200 S.W. (2) 695;

Crow vs. Continental Oil Co., (5 Cir.) 100 F. (2) 292;

Dallas Ry. & Terminal Co. vs. Sullivan, 108 F. (2) 581;

East Texas Theatres, Inc. vs. Swink, 177 S.W. (2) 195;

Ft. Worth & Denver City R. R. Co. vs. Hambright, 130 S.W. (2) 436;

Galveston-Houston Elec. Ry. vs. Reinle, 258 S.W. (2) 803;

- Grinnell vs. Carbide & Carbon Chemicals Corp.*, 276 N.W. 535;
- Hanson vs. Ponder*, 3 S.W. (2) 426;
- Harrison vs. Harrison*, 100 S.W. (2) 780;
- Herndon vs. Halliburton Oil Well Cementing Co.*, 154 S.W. (2) 163;
- Holmes vs. Ginter Restaurant*, 54 F. (2) 876;
- Johnson vs. J. I. Case Threshing Machine Co.*, 102 S.W. 1089;
- Kuptz vs. Sollitt & Sons Const. Co.*, 88 F. (2) 532;
- Mary vs. Grasselli Chem. Co.*, 98 F. (2) 877;
- McAfee vs. Travis Gas Corp.*, 153 S.W. (2) 442;
- Memphis Cotton Oil Co. vs. Gardner*, 171 S.W. 1082;
- Montgomery vs. Houston Textile Mills*, 45 S.W. (2) 140;
- Motejl vs. Greenwood, et al.*, S. Ct. of Oregon, 138 Pac. Reporter (2) 216;
- North American Dredging Co. vs. Pugh*, 196 S.W. (2) 255;
- Phillips Petroleum Co. vs. Hooper*, 164 F. (2) 743;
- Shuford vs. City of Dallas*, 190 S.W. (2) 721;
- Southern Ry. Co. et al., vs. Edwards*, 44 F. (2) 526;

- Sun Oil Co. vs. Kneten*, 164 F. (2) 806;
Texas & Pacific Ry. Co. vs. Bursey, 192 S.W. (2) 809;
United Production Corp. vs. Chesser, 95 F. (2) 521;
Texas & Pacific Ry. Co. vs. Day, 197 S.W. (2) 332;
United Production Corp. vs. Chesser, 107 F. (2) 850;
West Texas Utilities Co. vs. Renner, 32 S.W. (2) 268
 39 C. J., pp. 328 to 329, incl.;
Restatement of the Law of Torts, Vol. 2, Sec. 414,
 p. 1120;
Restatement of the Law of Torts, Sec. 427;
Rule 61 of the Federal Rules of Procedure.

VI.

ARGUMENT

- A. *The evidence was sufficient to authorize submission of the issue of discovered peril to the Jury and to support a Jury verdict based thereon.*

The evidence of Head to the effect that at around 7:00 or 7:30 P.M., he went by and told Wimberly and Kelley to complete the work that night; that at that time it was getting dark in the car and that there were no lights to use to light up the car plus the additional evidence that Head knew that the work was dangerous and knew that

an inexperienced man would not notice that the staves were stacked too straight by him and when he knew that he had failed to warn Kelley or Wimberley or anyone else that these hidden supports had been loosened, plus the further evidence offered by Head that the effect of his act would be to make it dangerous and easy to fall upon the Plaintiff, and the further evidence of Head that if light had been there it would enable the Plaintiff to at least have a chance of escaping should the steel fall, created and raised, if it could be raised by any evidence, the issue of discovered peril. (R. Pgs. 136 and 137-139 and 140). We have to go no further in this connection than the cases cited by the Supreme Court of Texas. In the case of *East Texas Theatres, Inc., vs. Swink*, 177 S.W. (2d) 195, the Appellant relied in the Court below upon the Swink case but the Swink case is easily distinguishable from the facts in the case at bar. The Supreme Court in discussing the Swink case said, through Mr. Justice Slatton from Page 198 of the opinion: "In order to raise the issue of discovered peril a new duty on the part of the employee of the petitioner must arise whereby the perilous position of Swink must have been discovered by the employee in time for the employee to be able, by the use of the means at hand, to avert the fall. According to the evidence, the act of jumping onto the stage and the fall of Swink was one continuous act, therefore, it is evident that no time remained for the discovery of the perilous position of Swink within the time sufficient for the employee of

petitioner to avert the fall. The testimony of Swink goes no further than to raise issues of primary negligence. The gist of Fallin's testimony is that Mr. Swink had jumped and fallen into the pit before he knew that he was going to jump. How, then, can it be said, under the evidence, that Swink was in a perilous position and that the employee of petitioner discovered his perilous position in time, by the use of the means at hand, to avert the fall and resultant injuries.

In the case at bar, the peril of Kelley was discovered at least at 7:30 P.M. His accident did not occur until 10:30 P.M. Head, by warning Kelley of the removal of the supports, by warning Kelley that lights should be there and by the placing of lights in said car, could have averted this accident and *by refraining from ordering Kelley to continue to work under such dangerous conditions in the night-time, an order which was given after he knew of Kelley's position of danger or probable danger, could have averted this accident.*

- B. *Evidence sufficient to authorize submission of the issue of negligence in failing to furnish a safe place to work, such as an adequately lighted place.*

The first decision cited by the Appellant is the case of *Harrison vs. Harrison*, 100 S.W. (2d) 780, in support of the proposition, to use the language of Appellant's Brief, "under the decisions in Texas, the employee of an inde-

pendent contractor is merely an invitee upon the premises and the contractee does not owe him the duty of furnishing him a safe place to work." This amazing statement of the law is clearly against the great way of authority. This Honorable Court has recognized this duty to furnish a safe place in which to work in the case of *Amacker vs. Skelly Oil Company*, 132 F. (2) 431 and the cases there cited, including *United Production Corp. vs. Cheesser*, 107 F. (2d) 850; *Montgomery vs. Houston Textile Mills*, 45 S.W. (2d) 140; *North American Dredging Company vs. Pugh*, 196 S.W. (2d) 255; *Crow vs. Continental Oil Company* (5 Cir.) 100 F. (2d) 292. The Crow case by this Honorable Court cites the important case by the Supreme Court of Texas, to-wit: *Galveston-Houston Electric Railway vs. Reinle*, 258 S.W. (2d) 803.

In the case of *West Texas Utilities Co. vs. Renner*, 32 S. W. (2) 268, the Court said: "But it will be noticed that this rule places upon such owner the duty, not only to warn of latent or concealed peril, but to have his premises in a reasonably safe condition. This rule was expressly approved by the Supreme Court in an opinion by Justice Greenwood in the Reinle case, supra."

Justice Hutcheson distinguishes the cases relied upon by the Appellant such as the case of *Kuptz vs. Sollitt & Sons Const. Co.*, 88 F. (2d) 532 in the Amacker case, in the following language:

"Appellant here, citing Restatement Torts Negligence 414 and 416, *United Production Corp. v. Chesser*, 5 Cir., 107 F. 2d 850; *Montgomery v. Houston Textile Mills*, Tex. Com. App., 45 S. W. 2d 140; *North American Dredging Co. v. Pugh*, Tex. Civ. App., 196 S. W. 255; *Crow v. Continental Oil Co.*, 5 Cir., 100 F. 2d 292, and others of like import, insists that under the uncontradicted evidence, the duty of due care to protect deceased from the dangers of asphyxiation while working in the tank was on the defendant. Insisting too that the evidence made out a case for the jury as to whether there was a breach of that duty, and whether deceased's death was the proximate result of that breach, or was the result of natural causes or of his own contributory negligence or fault, she urges upon us that the judgment must be reversed and the cause remanded for a new trial.

Appellee, not disputing that a duty of due care may be owing to an invitee, the servant of an independent contractor coming on premises to work, insists that this case is ruled by the principle announced in *Armour & Co. v. Dumas*, 43 Tex. Civ. App. 36, 95 S. W. 710, 711; *Kuptz v. Sollitt & Sons Construction Co.*, 5 Cir. 88 F. 2d 532; and like cases, that an owner is not liable for injuries caused by the changing character of the work where the very dangers to be anticipated inhere in and necessarily arise from work to be done. It also insists that, assuming a duty to warn an inexperienced worker of, and protect him from, dangers, the undisputed evidence shows that deceased was an experienced worker, that he knew the dangers and that he deliberately and with full knowledge thereof chose his own way of

doing the work, and as a matter of law, caused his own injury. It also insists that the evidence wholly fails to show death from asphyxiation.

It would serve no useful purpose to canvass and discuss the many authorities appellant and appellee cite. It is sufficient to say that the doctrine appellee invokes does not apply to this case where the work is static and precautions against injury from it can be easily taken. Cf. *Montgomery v. Houston Textile Mills*, supra, and *Reed Co. v. McDavid*, 5 Cir., 120 F. 2d 843.

The Crow case by this Honorable Court is clearly in point. In that case this Court said in substance as follows:

"We are clear in our opinion that Crow, the deceased, did not enter the premises of the Oil Company as an independent contractor. He was there as an invitee and it was the duty of this Company to exercise ordinary care to furnish him a reasonably safe place to perform the work of mending the tanks, and where a dangerous condition existed as it did, of which the Company knew or ought to have known, it should have warned Crow, or taken precautions against such dangerous condition of its premises with reference to the oil tanks. *Montgomery v. Houston Textile Mills*, Tex. Com. App., 45 S. W. 2d 140; *El Paso Printing Co. v. Glick*, Tex. Civ. App., 246 S.W. 1076."

In the case of *Sun Oil Company v. Kneten* by Mr. Justice Waller of this Court, the Amacker case as well as the Bell case is cited as supporting authority. The Amacker

case was a case presented to the Fifth Circuit by the author of this Brief and the Bell case was also the case of the writer's. We feel that the language of Judge Waller in the Kneten case, *supra*, is clearly in point in support of the issues of liability submitted to the jury in the cause at bar. In that case, Justice Waller said:

"The owner of the premises, or the employer of an independent contractor, generally owes no duty to guard the employees of an independent contractor against the negligence of the latter. However, he is answerable for his own negligence—for his own want of due care in the circumstances. Moreover, if the negligence of an employer concurs with negligence of his independent contractor and injuries thereby result to a third person, the employer is not absolved from liability merely because he has employed an independent contractor. The employer remains liable for the non-performance of any duties arising out of the work that do not devolve upon the contractor or upon one employee. 27 Amer. Jur. 30, page 509. If the employer of the independent contractor reserves the right of supervision and control and the right to direct the manner in which the servants of the independent contractor perform their work, he is under the duty to exercise reasonable care for their safety; or if he undertakes to furnish instrumentalities with which the contractor is required to perform the work, he owes to the employees of such contractor the duty of exercising ordinary care not to furnish appliances that are known by him to be inherently dangerous. It is also the law in Texas that when the work contracted for is unusually danger-

ous in itself, as the result of circumstances brought about by the owner or employer in the first instance, and injury proximately results from such conditions, the employer is responsible to servants of the independent contractor for such injuries.

Where the work of the defendant is being carried on connectedly and concurrently with the work of the independent contractor, we think that the employer is liable as a joint wrongdoer if his own failure to exercise due care in the circumstances occurred with the negligence of the contractor in producing the injury. See Note 3, 30 A. L. R. 1508, and cases annotated thereunder.'

How can it be contended in this case that the work contracted for was not unusually dangerous as a result of circumstances brought about by the owner or the employer in the first instance. Need we go any further than to point out that Head, who was the appellant's representative on the job, removed the supports and the crates from the inside of the staves of steel thereby making it easier and if the testimony of Wimberly is believed, making it possible for the tank staves to fall upon Kelley. The appellant answers that this testimony is an irreconcilable conflict but the jury had the right to pass upon how much of whose testimony they were going to believe. They could believe, for instance, that Head loosened some of the supports and not all of them but that he did loosen enough of the supports to make it possible for the remaining supports to give way and thus cause the accident, accord-

ing to the manner in which Wimberly said same was caused. We have here a situation where the work of the defendant was being carried on connectedly and concurring with the work of the independent contractor and we think clearly that Judge Waller's opinion is right as rain and that the employer is liable as joint wrong-doer *since his failure to exercise due care* in the circumstances concurred with the negligence of the contractor in producing the injury.

In the Crow case the Fifth Circuit Court clearly recognized the duty of the Company to warn Kelley of his danger or to have taken precautions against the dangerous conditions existing where the Company knew, *or ought to have known*, that an injury might occur when Kelley attempted to remove the steel. We say that the Crow case is indistinguishable with the law involved here.

In this case, *the danger of the steel falling was present at the time Kelley went to work and continued during all of the time that he did work, due to an act of the appellant's employee, Head, in removing at least a portion of the supports. One could not look at the steel and see that the supports had been removed since the supports were hidden in between the staves of steel and would have had the appearance of safety to an inexperienced man such as Kelley* and hence, it was a latent present danger created by the appellants for which they are responsible under the above decisions by this Court.

The case of *Fort Worth & Denver City R. R. Co. v. Ham-bright*, 130 S.W. (2d) 436, cited by the appellant, is in support of the plaintiff's contention that if a dangerous condition was known to exist to Head and not to Kelley, it was the duty of Head to warn Kelley.

- C. *Evidence sufficient to justify submission to the jury of the issues of negligence on the ground of Head's ordering the work done at night, knowing the light was inadequate and the steel unsafely stacked and to support a jury finding on such issue.*

The appellant argues, under its Point C from Page 44 of their Brief, as follows:

"The mere ordering of the work to be done at night is now in and of itself negligence. In order to constitute negligence it was necessary to show and for the jury to find that Head, at the time of giving the order, knew that the lights would be inadequate, and that the steel was unsafely stacked."

If the evidence of Head that at 7:30 he told them that it was dark in the car and that they had no lights and that he then and there ordered them, with quite a lot of steel remaining to be unloaded, to finish unloading that car at night, together with his testimony heretofore set out that an inexperienced man wouldn't notice that he had set the steel too straight after having removed the supports and made it possible for it to be easy for the

steel to fall—if this proof doesn't comply with the proof that the appellant's counsel says is necessary to make a fact issue for the jury, then we challenge the appellant's counsel to show how such proof could possibly be made. This evidence brings this case within the rule where the employer reserves *the right to determine the working conditions* under which the work is to be performed by the servants of the independent contractors.

Section 414, Page 1120, Vol. 2, Restatement of the Law of Torts, lays this rule down as follows:

“One who entrusts work to an independent contractor but who retains control of any part of the work is subject to liability for bodily harm to others for whose safety the employer owed a duty to exercise reasonable care which is caused by his failure to exercise his control with reasonable care.”

Under comment, the author proceeds as follows:

“a. If the employer of an independent contractor retains control over the operative details of doing any part of the work, he is subject to liability for the negligence of the employees of the contractor therein under the rules of that part of the law of agency which deals with the relationship of master and servant. The employer may, however, retain control less than that which is necessary to subject him to liability as a master. He may retain only the power to direct the order in which the work is being done, or forbid its being done in a manner likely to be dangerous to himself or others. Such a super-

visory control may not subject him to liability under the principles of agency but he may be liable under the laws stated in this section, unless he exercise his supervisory control with reasonable care so as to prevent the work which he has ordered to be done from causing injury to others.

b. The rule stated in this section is usually, though not exclusively, *applicable when a principal contractor entrusts a part of the work to sub-contractors, but himself or through a foreman superintends the entire job.* In such a situation the principal contractor is subject to liability if he fails to prevent the sub-contractors from doing even the details of the work in a way unreasonably dangerous to others. *If he knows, or by the exercise of reasonable care should know, that the sub-contractor's work is being so done and has the opportunity to prevent it by exercising the power of control which he has retained in himself so too, he is subject to liability if he knows or should know that the sub-contractors have carelessly done their work in such a way as to create a dangerous condition and fails to exercise reasonable care either to remedy it himself or by the exercise of his control cause the sub-contractor to do so."*

D. *Failure to warn appellee of the removal of the staves.*

The removal of the supports from the staves was not an obvious matter since the evidence showed that the crating and the supports were in between the staves which would hide the supports and would make it a hidden

and latent defect that they had been loosened in the middle and behind. Then the appellant argues in the second place that the removal of the staves, even though it created a dangerous condition, that an experienced man would have recognized the condition created. They cite a number of cases, including one Texas case, the case of *Texas & Pacific Ry. Co. v. Bursey*, 192 S.W. (2d) 809. On page 49 of appellant's Brief they set forth this rule from the Bursey case:

"The rule seems to be that where the servant solicits employment in a particular calling, the master has the right to assume in the absence of information to the contrary, that the servant is qualified for that particular work."

The trouble with the above statement is that they did not give the rest of the sentence but saw fit to stop on a comma and an incomplete sentence, thus making the statement of the Court misleading and an incorrect statement of the law. We now give the *rest of the sentence*:

" * * * in the duty of cautioning and instructing the servant other than as to latent or extraordinary dangers arising only from facts brought to the master's notice of the disqualification of the servant to safely encounter dangers known to him."

That rule is apparently the one invoked in this instance but we think it has no application, for the reason that it is not shown that Bursey was employed to do that particular character of work. The evidence is sufficient to

justify the conclusion that he was entirely ignorant of the dangers to which he became exposed and that this was known to the appellant. There is nothing in the evidence to indicate that he *induced* his employer to believe that he was fitted for that character of work or *knew the dangers* incident to its performance. The author last referred to says:

"The question whether the master, at the time of engaging the servant, or servants, ought to have inquired whether he was experienced or not, or should have taken notice, under all the facts, of the probability that he was not, nothing being said on the subject by either party, is a question for the jury."

When the above law is applied to the facts here involved, it is quite clear that Kelley should have been warned as to the latent and extraordinary danger brought about by the appellant's representative, Head, in loosening the supports. Head knew that he had not warned them of the fact and after loosening the supports and making the steel easier to fall he had attempted to straighten the staves so as to give them an appearance of safety. He further knew that to an inexperienced man that the staves would not look dangerous and of course, the evidence shows that the staves, due to the manner in which they were constructed, always lean a little toward one side or the other since the staff is curved at the top. Even an experienced man should have been warned of this danger that was created by Head.

Certainly Kelley did not solicit employment or represent that he was experienced and at the most this was an incidental question for the jury and we feel that the appellant should not quote part of the case here involved and thus make the statement of law which is laid down in the case appear incorrect.

To begin with, different rules apply as to the relationship of master and servant and that of invitor and invitee. That difference is not with reference to the duty to furnish a reasonably safe place in which to work, for instance, see the case by the Supreme Court of Massachusetts, *Carpenter vs. Sinclair Refining Company*, 129 N.E. 383, wherein the Court said:

"At the time of the accident, the Plaintiff was the employee of an independent contractor. He was on the defendant's premises by the defendant's invitation, and under these circumstances *it owed him the same duty that it owed to one of its own employees*. That duty was to warn him of dangers incident to his work which he did not know of or apprehend and could not reasonably have discovered, and which dangers the defendant knew or should have known. *The defendant could not delegate this duty to warn the plaintiff respecting obscure and concealed dangers.*"

The distinction exists in that it is the duty of the employer of the independent contractor to be aware of danger existing in the transaction of the business contracted for.

In this connection, see *Boal v. Electric Storage Battery Company* (3d Cir.) 98 F. (2d) 815; *Mary v. Grasselli Chemical Company*, 98 F. (2d) 877, in which the Court said:

"It makes no difference whether or not the defendant was actually aware of the danger for it is 'charged with the knowledge of * * * the nature of the constituents and general characteristics of the substance used in his business, so that he can give directions for the conduct thereof with ordinary safety to his servants performing the work with ordinary care.'"

The argument is made that where an owner of property calls upon a trucking contractor to transport freight or other materials he has the right to assume that the men furnished by the contractor are competent and experienced. The above statement is not tenable as shown by the above *Bursey* case and is not tenable with the announcements of these cases above discussed since in this case the owner of the property did not call upon a trucking contractor to simply transport freight but invited them to premises under their control and the premises which they had, by their own acts, to-wit, the acts of Head in removing the supports, created a highly latent and dangerous condition.

In the *Reinle* case, 258 S.W. 803, the Supreme Court of Texas expressly held that an employee of an independent contractor upon the premises is an invitee of the owner and that the owner or occupant of the premises owes a duty to such employee of the independent contractor to

maintain the premises in a reasonably safe condition. The owner of the premises was held liable to the employee of the independent contractor for injuries sustained by reason of an unsafe condition of the premises, even though the independent contractor was also negligent in failing to warn his employee of the condition. The holding of the court was in part as follows:

" * * * The contract involved an invitation by the interurban company (occupant of the premises) to the (independent) contractor's employees to labor within the danger zone. * * * The facts, therefore, bring the case within the rule that one cannot, for his own advantage, invite others to come on, or to remain about, premises in his possession and under his control, without using proper care to give warning of a grave danger to be probably there encountered of which the invitees may have no knowledge.

Judge Cooley, for the Supreme Court of Michigan, said:

" 'Every man who expressly or by implication invites others to come upon his premises, *assumes to all who accept the invitation* the duty to warn them of any danger in coming which he knows or ought to know of, and of which they are not aware.' *Samuelson v. Cleveland Iron Mining Co.*, 49 Mich. 170, 13 N. W. 501, 43 Am. Rep. 456.

Judge Strong, for the Texas Commission of Appeals stated the general rule to be:

" 'The owner or occupant of real property is under no obligation to make it safe for the benefit of

trespassers, intruders, or mere licensees coming upon it without his invitation, expressed or implied. If, however, such owner or occupant invites the public or particular members of it to come upon his premises, he owes to such persons the duty to have same in a reasonably safe condition and to give warning of latent or concealed perils.' *Bustillos v. Southwestern Portland Cement Co.*, 211 S. W. 929.

" . . .

"The Court answers that it was the DUTY of the interurban company to exercise ordinary care to give Reinle (employee of the independent contractor) notice or warning of the danger of the boom coming in contact with, or in close proximity to, the uninsulated high-voltage wires, notwithstanding Reinle was an employee not of the interurban company, but of the independent contractor, who possessed full knowledge of the danger."

It is therefore seen that under the law of this state an owner or occupant of premises owes a duty to employees of an independent contractor on the premises, to keep the premises in a reasonably safe condition or to warn of latent dangers. Considering the question merely from the standpoint of practical justice, why should an employee of an independent contractor be barred from recovery against the owner, when other invitees would be allowed to recover against the owner? If a duty is owed to a child attracted upon the premises by a dangerous instrumentality, why is not a duty owed to a person who

is on the premises to do work for the ultimate benefit of the owner? Or, if a duty is owed by the owner to a member of the public who is injured by falling into an unguarded pit near a public way, why is not a duty owed by the owner to an invitee who is injured by a negligent condition on the premises? FORESEEABILITY OF INJURY is the test as to whether an owner or occupant owes a duty to a person. Surely it must be held that it is reasonably foreseeable that an employee of an independent contractor would likely be injured if the premises were negligently allowed to remain in an unsafe condition.

E. The evidence was sufficient to support a finding by the jury that the work was inherently dangerous.

We shall undertake to show what the well established law in Texas is with reference to what is meant by the term "inherently dangerous work." The leading case in Texas on inherently dangerous work is the case of *Cameron Mill & Elevator Co. v. Anderson*, 87 S.W. 282. According to that case the owner or occupant of the premises is deemed to be negligent, if the independent contractor is negligent, under these circumstances, because the duty to exercise the highest degree of care where intrinsically dangerous work is involved is a duty which the owner cannot delegate, and cannot shift to the independent contractor so as to free himself of liability. Judge Speer, in the opinion of the Court of Civil Appeals in the *Mill &*

Elevator case which was expressly approved by the Supreme Court through Judge Gaines, stated the basis for the rule as follows:

" * * * Ordinarily, we know that the principle of respondeat superior does not extend to cases of independent contracts, but it is not alone upon this doctrine that we predicate liability. Indeed, it may be doubted if the doctrine of respondeat superior has any application. Appellant is not the superior of McFadden in the sense that it had any control over the men or agencies employed in the work, but its liability rests upon the broad ground that it cannot knowingly set in operation causes dangerous to the persons of others without taking all reasonable precautions to anticipate, obviate, and prevent such probable consequence; * * * " (78 S. W. 8)

27 Am. Jur., page 515, 516, after defining inherently dangerous work states: "This rule is sufficiently comprehensive to embrace, not only work, which, from its demonstration, is inherently or 'intrinsically dangerous,' but also work which will in the ordinary course of events, occasion injury to others if certain precautions are omitted, but which may, as a general rule, be executed with safety if those precautions are adopted."

The case of *North American Dredging Company v. Pugh*, 196 S.W. 255, states the rule in Texas:

"For liability to attach to the employer of an independent contractor, it is not required that it be absolutely necessary that injuries to third persons will result from the doing of the work, but if the

work is so inherently or intrinsically dangerous that injuries will probably be occasioned to third persons unless proper precautions are taken, the employer may be liable for such injuries, though primarily they are caused by the negligence of the contractor in failing to take the necessary steps to avoid the danger."

We know of no better method of setting forth the well-established law relative to the inherent danger rule than quoting from 39 C. J., pages 1328 to 1329, inclusive:

"Sec. 1540 f. WORK DANGEROUS UNLESS PRECAUTIONS OBSERVED.—

(1) **IN GENERAL.** A very important exception to the general rule exempting the contractee from liability for injuries caused by the negligence of an independent contractor or his servants is that, where the work is dangerous of itself, or as often termed in 'inherently' or 'intrinsically' dangerous, unless proper precautions are taken, liability cannot be evaded by employing an independent contractor to do it. Stated in another way, where injuries to third persons must be expected to arise unless means are adopted by which such consequences may be prevented, the contractee is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else, whether it is the contractor employed to do the work from which the danger arises, or, some independent person to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. The taking of these precautions, it is said, is a nondelegable duty owing to third persons who may sustain injuries from the

work, and the contractor is considered an agent or servant for whose act his employer is responsible. The injury need not be a necessary result of the work, but it is sufficient that it will be a probable result of the work if proper precautions to guard against injury are not taken. However, the work must be such as will probably, and not which merely may, cause injury if proper precautions are not taken. If the work is of such a nature that it could be done without probable injury to any one except in the event of negligence in the manner of doing it, no liability attaches to the employer.

THIS EXCEPTION IS BASED upon the usual danger to third persons which inheres in the mere performance of the work itself aside from any negligence on the part of the contractor, or his servants, and the reason for the imposition of liability is the duty of due consideration which one in a civilized community owes to his fellows and to the public, which duty precluded the ordering of that which if done will be inherently dangerous.

(Sec. 1541) (2) **WORK DANGEROUS TO INVITEES OF CONTRACTOR.** An application of this exception to the general rule of non-liability is found in decisions holding that, when the owner of premises which are under his control employs an independent contractor to do work upon them which from its nature is likely to render the premises dangerous to persons who may come upon them by the invitation of the owner, the owner is not relieved by reason of the contract from the obligation of seeing that due care is used to protect such persons.

(Sec. 1542) (3) WHAT WORK IS INHERENTLY DANGEROUS.—

(a) IN GENERAL. Whether work of a given character is to be regarded as 'necessarily' or 'inherently,' or 'intrinsically' dangerous, or its performance 'attended with danger to others' within the meaning of such terms when used in this connection, is often a matter as to which different opinions may be entertained. However, in determining in any given case whether any particular work is inherently dangerous, the proper test, it is said, is whether danger inheres in the performance of the work. The test as to 'inherently dangerous' work is not whether a man of ordinary prudence would have anticipated that the injury would have ensued therefrom, nor can mere liability to injury from doing the work be the test, since injuries may happen in any undertaking and many are attended with great danger if carelessly managed, although with proper care they are not specially hazardous."

These principles of law are supported by many, many cases, one of the leading cases by the Federal Courts being the case of *American Pacific Whaling Co. v. Kristensen*, 93 Fed. (2d) 17, in which the Court said:

"If work done by an independent contractor has in it an inherent element of danger, and through negligence of the contractor proper provision has not been taken to guard against such danger, such negligence is imputed to the employer."

The Court further said:

"If the work from its nature is likely to cause danger to others, there is a duty on the employer to take all reasonable precautions against such danger, and employer does not escape liability for the discharge of that duty by employing an independent contractor, if the latter does not take proper precautions."

Section 427 of the Restatement of the Law of Torts, together with the comment thereon under Section "a" explains this situation so as to show the right of the appellant to recover:

"Section 427. Negligence in Doing Inherently Dangerous work. One who employs an independent contractor to do work which is inherently dangerous to others is subject to liability for bodily harm caused to them by the contractor's failure to exercise reasonable care to prevent harm resulting from the dangerous character of the work.

"Comment: (a) Meaning of 'Inherently Dangerous.' The words 'inherently dangerous work' are used to indicate not only that the nature of the work itself, or of the instrumentalities which must necessarily be used in doing it, is such that it can only be safely performed by exercise of a special skill and care as distinguished from work which can be safely done if performed with ordinary skill and care is dangerous irrespective of whether special skill or care is used, but also that the work if unskillfully and carelessly done, involves a great risk of serious bodily harm or death.

"The usual situations in which the liability stated in this section is imposed are those in which the work

in hand involves the use of instrumentalities, SUCH AS FIRE OR HIGH EXPLOSIVES, which require constant attention and skillful management in order that they may not be injurious to others, or those in which the work itself, *like the demolition of a high chimney*, is incapable of being safely done unless the persons who do it are highly skilled and act with the utmost attention and care. The liability stated in this section extends only to harm which is caused by the failure so to act as to minimize to the uttermost the danger inherent in the nature of the work or in the instrumentalities used. It does not extend to harm caused by negligence in a particular detail of the work which in itself is not inherently dangerous. Thus, one who employs a contractor to do blasting close to a public highway or to the land of another is liable under this Section if the blasting is carelessly done, *or the explosives carelessly handled by the contractor or his servant.*"

It is to be observed that the definition complained of in this case was taken from the Restatement of the Law of Torts and was so given in the court's charge verbatim.

For examples of work held to be inherently dangerous, see the cases of *Johnson v. J. I. Case Threshing Machine Company*, 182 S.W. 1089; *Grinnell v. Carbide and Carbon Chemicals Corp.*, 276 N.W. 535, and the many cases there cited. Surely, if the digging of the ditch in a street is inherently dangerous work as was held by the Supreme Court of Texas in the Cameron case, then how can it be contended that requiring men to work around heavy staves of steel in the nighttime when those staves of steel have

had their supports weakened by the appellant without warning to the appellee is not inherently dangerous work? No better rule as to what constitutes inherently dangerous work can be found than that referred to by Judge Hutcheson's case and cited in the foot note.

The unloading of the steel under ordinary circumstances might not have been inherently dangerous but when the appellant determined that the work should be done in the nighttime without lights and when the appellant, by his own acts, created a hidden trap and highly dangerous situation by loosening the supports, *then work that ordinarily would probably be considered not inherently dangerous becomes inherently dangerous and of this we think there is no doubt.*

- F. *The undisputed evidence shows that the appellee did not assume the risks and was not guilty of contributory negligence as a matter of law and at the most, a question of whose negligence was a proximate cause of the event, was a matter for the jury.*

The first case relied upon by the appellant in its Brief before the 5th Circuit is the case *United Production Corp. v. Chesser* in which they cite the opinion in 95 F. (2d) 521 on the last trial of the Chesser case. This Honorable Court in 107 F. (2d) 850, the opinion being by Mr. Justice McCord, affirmed the judgment for the plaintiff and

we think the opinion is important upon the question of contributory negligence in this case for the appellee, as shown by the opinion, in which this Court said in part as follows:

"Thornhill went upon the premises as a business invitee of the appellant for the purpose of performing work in conjunction with the employees of the appellant United Production Corporation. He had, therefore, the right to assume that the employees of the invitor were performing their duties in a workmanlike, careful manner, and it was not incumbent upon him to make any inspection of their work to ascertain whether or not they were performing it properly. *Texas Pacific Coal & Oil Co. v. Grabner*, Tex. Civ. App., 10 S. W. 2d 441, 444.

We find no evidence that the deceased failed to exercise ordinary care in his work, and in the absence of evidence to the contrary there is a presumption that Thornhill was conducting himself with prudence and was exercising ordinary care. *Missouri, K. & T. v. Luten*, Tex. Com. App. 228 S. W. 159; *Jordan v. City of Lubbock*, Tex. Civ. App. 88 S. W. 2d 560; *Texas & P. Ry. Co. v. Wylie*, Tex. Civ. App., 36 S. W. 2d 238; Contributory negligence cannot be presumed and there is nothing in the record to compel a finding by the jury that Thornhill was guilty of contributory negligence. The issue was properly submitted to the jury. *Houston & T. C. Ry. Co. v. Pollock*, Tex. Civ. App., 115 S. W. 843; *Id.*, 103 Tex. 69, 123 S. W. 408; *Rio Grande El Paso & S. F. Ry. Co. v. Lucero*, Tex. Civ. App., 54 S. W. 2d 877; *Jordan v. City of Lubbock*, Tex. Civ. App., 88 S. W. 2d 560."

In this case the evidence shows that Kelley testified that he believed or presumed that it was safe to remove the steel or else he would not have been requested to do so by the appellant's representative, Head. The Chesser case is the authority for the fact that Kelley had the right to make this assumption since he knew that Head had been working in the car which he had been asked to finish unloading and he would not have to make any inspection to see whether or not Head had maintained the necessary safeguards so that the car load of steel could be safely unloaded. The cases cited by the appellant upon which they rely to sustain this point of contributory negligence as a matter of law, in addition to the Chesser case are *Southern Railway Company, et al v. Edwards*, 44 F. (2d) 526, and *Anderson, et al v. Southern Railway Co.*, 20 F. (2d) 71. The case of *Hanson v. Ponder*, 3 S.W. (2d) 426, by the Commission of Appeals of Texas, distinguishes this case from the Anderson case in the following language:

"In the original opinion we did not particularly notice the contention that Hanson was guilty of contributory negligence as a matter of law in respect to which, it is said, there was requisite proximity of causation. That question is represented with the addition of *Anderson v. Southern Ry. Co.* (C. C. A.) 20 F. (2d) 71, as authority, and we will discuss it briefly.

In general, it may be said that the proof which made issuable negligence as charged to the carriers would include indication of an issuable nature, also,

for Hanson's asserted negligence. In addition, there is evidence of his being directed in a general way by his superiors to go upon the car and load and do what he did do, that some of the acts done immediately before the load began to roll were done by other workers, and that, as a fact, he was not cognizant of any particular danger.

Anderson v. Southern Ry. Co. is readily distinguishable on the facts. It was "admitted" there that the load, etc., was made to conform to rules of the "American Railway Association," and here that point is issuable (as shown in the original opinion); there, all of the wires were cut under positive directions of the man who was killed while he was on top of the "load"—that command being given by him despite warning of danger then expressly given him by the man who was ordered to cut the wires and to which he responded (in effect) that would take the chances—while no comparable hypothesis exists (at least, is not conclusively established) in the evidence here. The fact conditions, which existed there (as shown by admissions of "uncontradicted" evidence), and which, as noted, do not exist here, exerted great force (as is apparent in the opinion) to impel the decision made—if, indeed, the conclusion there reached does not rest in its entirety upon those conditions."

It is to be observed that the danger attendant to unloading materials from box cars is sufficiently dangerous that rules have been formulated by the American Railway Association as to how box cars may be safely unloaded. In this case, we have more negligence than existed in the Ponder case, plus the important fact that the act

of unloading was not under the exclusive control of Kelley but that the danger that caused the accident had heretofore been created by Head.

The case of *Motejl vs. Greenwood et al* by the Supreme Court of Oregon, 138 Pacific Reporter (2d) 216, also distinguishes the Anderson and Edwards' case from the facts in the case at bar. From Page 219 of the opinion, the Court says:

"Defendants cite two cases involving the operation of unloading poles from a flat car. These cases are *Southern Ry. Co. v. Edwards*, 5 Cir. 44 F. (2d) 526, and *Anderson v. Southern Ry. Co.*, 4 Cir., 20 F. (2d) 71. In these cases employees of the consignees were engaged in unloading the poles when the accidents occurred. There is nothing in the record of either case indicating that any part of the operation of unloading, or for that matter loading the poles, was performed or attempted by the carrier.

In the Edwards case, the poles were loaded on a flat car by the shipper at a point on the line of the Mobile & Gulf Railroad. The car was received by the defendant carrier at a station on said defendant's line and transported to its destination.

In the Anderson case, the car in question was shipped from Brunswick, Georgia, over another line of railroad, but was accepted by defendant and transported over defendant's line to Aiken, South Carolina. There it was placed on a side track for the purpose of being unloaded by the consignee. In the case at bar, the testimony is to the effect that usually the driver of the truck, an employee of defendant

Greenwood, removed the binder chain which obviously comprised part of the operation of unloading the logs.

(5, 6) To the point, that there is no obligation to warn of an obviously dangerous condition, a number of cases are cited. That rule is applicable to defendants as well as plaintiff's decedent. In the instant case, decedent would not have been injured if the binder chain had not been removed. Defendant Hansen had been told of the disarrangement of the logs. If the disarrangement of the logs was obvious, both the warning he had received and the obvious fact itself should have prevented him from removing the binder chain. In that state of the record, we are unable to concur with defendants in the suggestion that decedent was negligent in not telling Hansen not to remove the binder chain. In thus treating the matter, we are not unaware that Hansen said that decedent removed the binder chain, but the evidence on that point is conflicting and the trial court found that Hansen removed it. We are bound by the finding of the trial court. Decedent had a right to rely upon the assumption that Hansen would not be so recklessly unmindful of decedent's exposure to the direful result as to remove the binder chain."

We think the reasoning in the above case is excellent and Kelley had the right to rely upon the assumption that Head would not be so recklessly unmindful of Kelley's exposure to the direful result that followed as to remove a portion of the supports, thereby making it possible for the steel to fall upon Kelley.

This Honorable Court, in another opinion by Mr. Justice McCord in the recent case of *Phillips Petroleum Company vs. Hooper*, 164 F. (2d) 743, follows the Texas rule as to what constitutes contributory negligence in this language: "We further find no merit in defendant's contention that Hooper was guilty of contributory negligence as a matter of law. It was the duty of the defendant to furnish Hooper a reasonably safe station in which to enter and transact business. Hooper was not required upon each visit to inspect the premises for hazards or to anticipate that such premises were dangerous."

Citing *McAfee v. Travis Gas Corp.*, 153 S. W. (2d) 442, *American Stores Co. v. Murray*, 87 F. (2d) 894, *Holmes v. Ginter Restaurant*, 54 F. (2d) 876. The McAfee case, as cited by Judge McCord, is a leading case in Texas on the question of contributory negligence. In that case the Court said:

"We interpret the opinion of the Court of Civil Appeals to hold that because McAfee went to the place this pipe line was leaking, with full knowledge of the facts, and with full knowledge that such leaking pipe was an object of danger, he was guilty of contributory negligence as a matter of law. We are unable to agree to such a conclusion. The mere fact that a person may expose himself to a danger will not preclude a recovery. In order to preclude a recovery the danger must be such that a person of ordinary prudence under like circumstances would not subject himself to it. 28 C. J. 598. THE MERE FACT THAT

A PERSON MAY PARTICIPATE IN AN OPERATION ATTENDED BY SOME LATENT DANGER WILL NOT RENDER HIM GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW. IT IS THE ESTABLISHED RULE IN THIS STATE THAT EVEN WHERE A PERSON HAS KNOWLEDGE, ACTUAL OR IMPUTED, OF A DEFECT, A QUESTION OF FACT AS TO NEGLIGENCE IS PRESENTED UNLESS IT CAN BE SAID, AS A MATTER OF LAW, THAT A PERSON OF ORDINARY CARE WOULD NOT HAVE INCURRED THE RISK .

"Gulf C. & S. F. Ry. Co. v. Gascamp, 69 Tex. 545, 7 S. W. 227; Gulf C. & S. F. Ry. Co. v. Irick, Tex. Civ. App., 116 S. W. (2d) 1099; 30 Tex. Jr. p. 764, sec. 96; Northcutt v. Magnolia Petroleum Co., Tex. Civ. App. 90 S. W. (2d) 632, writ refused

"In the Gascamp case, *supra*, the opinion is by Judge Gaines. The opinion discloses that the plaintiff was injured while crossing a bridge. The bridge was located upon a public road at a point where the road crossed the track of the railway company. It was the duty of the railway company to keep the bridge in repair. The bridge was in a bad state of repair and was dangerous to use. Plaintiff knew the dangerous condition of the bridge, but in spite of such knowledge attempted to cross it on horseback. A plank of the bridge, which was loose and rotten became displaced and frightened plaintiff's horse. This caused plaintiff to be thrown onto the railway track, thereby inflicting on him serious injury. Plaintiff was on his way to town, and the bridge was on the only road he could get there on. The railway

company contended that plaintiff was guilty of negligence, as a matter of law, in attempting to cross a bridge he knew was in a defective and dangerous condition. The jury acquitted the plaintiff of negligence. This Court, under the above facts, held that even though the plaintiff knew the bridge was in a dangerous condition, and that it was dangerous to cross it, still it was not negligence, as a matter of law, for him to risk such danger unless it could be further said that a person of ordinary prudence would not have incurred the risk. We quote the rule as announced in the opinion (69 Tex. 545, 7. S. W. 228):

" * * * According to the rule in this Court, in order that an act shall be deemed negligent, per se, it must have been done contrary to a statutory duty, or it must appear so opposed to the dictates of common prudence, that we can say, without hesitation or doubt, that no careful person would have committed it. * * *

"It is our opinion that the case at bar comes directly under the rule announced in the Gascamp case, supra. Certainly, if the operator of this gas pipe line had notice that it was leaking, under the facts above detailed, the jury was amply justified in finding negligence and proximate cause against it. Gas is a very dangerous substance. When a gas company has notice of a break in its pipe line, it must use due care and diligence to prevent the escape of gas therefrom. 21 Tex. Jr., pp. 11 to 15; McClure v. Hoopeston Gas & Elec. Co., 303 Ill. 89, 135 N. E. 43, 25 A. L. R. 250, See annotations 25 A. L. R. 262.

"Also under the facts detailed, the question as to the negligence of McAfee was a question for the jury.

The mere fact that he knew about these leaks and knew that they constituted a dangerous condition would not, under the facts of this record, render his act of showing them to Joe Woods negligence as a matter of law."

While there are at least twenty Texas cases that we could discuss holding that the question of contributory negligence and proximate cause in cases where materials were negligently stacked and fell, were questions for the jury, we think it sufficient to cite the case of *Memphis Cotton Oil Co. v. Gardner*, 171 S.W. 1082, in which the Court said:

"On December 24, 1912, he was ordered by Holland to stop the work of unloading and to go to work assisting the removing, retagging and loading certain sacks of meal from appellant's meal room into a car set for the purpose of being loaded; that some time prior thereto defendant, its foreman and employee, stacked a great number of sacks filled with cottonseed meal in its meal room in close proximity to the sacks which he was commanded to handle, and in doing so carelessly and negligently failed to tie or interlock said sacks in such manner as to insure the stacks standing against jars or shaking incidental to the running of the machinery therein; that the sacks weighed about 100 pounds each and were stacked one upon another to a great height, thereby rendering the same topheavy and liable to fall and dangerous to the life and limb of such employees of the company who were required to work in close proximity thereto; that the row of sacks nearest to where appellee

was about work were stacked with the ends towards his position, giving it the appearance of safety, and that he was ignorant of the true condition of the stack of sacks; that he was not informed of the danger attending the performance of the work to which he had been temporarily assigned; that the particular work he thus began to do was the lifting of sacks from the floor or from low stacks commencing but little above the place of the meal room and setting same at or near the door to retag, and which were taken away and loaded in the car by other hands. While thus engaged, and in a short time after beginning the work, and without knowledge on his part of danger and from causes unknown to him other than the negligent, careless, and insecure stacking above set out, a great number of sacks of meal fell from their high and insecure position and struck and bruised him, mashing him to the floor beneath their weight. It is alleged that the putting of the sacks in the stack, as above described, in the negligent manner in which they were placed was the direct and proximate cause of appellee's injuries and that defendant, its foreman and employees, did not stack the said sacks as a person of ordinary prudence would have done under the same circumstances, and as was their duty to do, all of which was known to defendant, its foreman and employees, and could have been known, by the use of ordinary care and diligence, at the time and before the injury, and that they were negligent in failing to warn plaintiff of the danger in which he had been so suddenly placed by order of the foreman. The appellant denied negligence in the particulars alleged, and alleged that the plaintiff voluntarily engaged in the work and was not working at said time

under the direction of defendant or any agent authorized or empowered to direct him to engage in such work; that his injuries were caused and due to his negligence being due to his own carelessness in removing and loading the sacks of meal whereby he incurred danger not necessarily incident to the work in which he was engaged; that the sacks were visible to him and all the dangers incident to said sacks stacked as they were at said time were openly visible to him and he really knew or could have known of the danger incident to the work by the use of ordinary care; and that he is thereby deprived of any right of recovery.

"The first assignment attacks the finding of the jury because the finding that defendant did not provide plaintiff a safe place in which to work is against the undisputed evidence, which is to the effect that there is no danger in the place in which plaintiff was at work, and the only danger to which plaintiff was exposed was caused by his own carelessness and his negligent manner in doing the work; that he was not engaged in tagging and retagging the sacks of meal, but was pulling down sacks in a negligent manner by pulling sacks from beneath instead of removing them from the top, which work he was doing voluntarily without instructions either as to doing or the manner in which he was to do the work from anyone, and with full knowledge of the danger to which he was exposing himself by the way he was removing said sacks of meal. Appellant submits this assignment as a proposition, and two other propositions are submitted thereunder: First, that plaintiff based his cause of action upon the negligence of defendant failing to stack the sacks in the meal room as an ordinarily prudent person would

have done and upon no other ground. It was incumbent upon the plaintiff to establish the same by a preponderance of the evidence, and, if he failed, the court should not have submitted the issue to the jury. And second, plaintiff could only recover upon the allegation of negligence alleged, and, if the evidence did not support same, it was error to submit a right of recovery upon any other ground, even if the evidence supported the other ground not alleged, and the court should have instructed a verdict for the defendant.

"The first issue submitted to the jury in effect is:

"'Did the defendant company, its foreman and employees, fail to stack the sacks with a view of avoiding injury, as an ordinarily prudent person would have done?'"

"The jury answered this question in the affirmative. We are at a loss to understand what issue was here submitted that had no pleading to support it. The jury further found that the appellee was not guilty of contributory negligence, and further answered that the danger in handling the sacks was not open and visible, so that plaintiff could see, or know of it, or, from the nature of the work, would reasonably acquire knowledge of such danger; and further that he did not voluntarily assume the risk. They also found that P. M. Holland, the foreman of the mill, instructed him to move the sacks and to work in the place where the sacks were being moved. The testimony of appellee and that introduced by him is to the effect that P. M. Holland, the foreman and manager of the mill, who had the authority to employ and discharge, directed the appellee to assist

in tagging and retagging the sacks, and that, in obedience to such instruction, appellee left the work to which he had been assigned, and which he had theretofore been doing (that is, unloading cottonseed cake and carrying it into the mill or crusher to be ground into meal); that he went into the room where the meal was stacked to assist those engaged in tagging and retagging the sacks. In order to tag and retag the sacks, it was necessary to take the sacks from the stacks and place them so the old tags could be taken off and new ones put on, and, while he was removing the sacks, a stack of the sacks fell on him, covering him up, injuring his ankle, etc. His evidence is that he did not know who had or how the stacks had been constructed previous to his going to work, and that no one warned him of the danger therefrom. He further testified that he thought he would be perfectly safe in getting the sacks, and if he had not so thought, he would not have gone in after the sacks. The evidence shows that sacks had been taken by others from the two tiers when appellee went into the room to work, and these two tiers extended about one-third the height of the stack at his side, or about six or seven high. It was out of these tiers that appellee commenced to remove the sacks, and he had been there but a short time when the stack fell over and caught him. He further states that the ends of the sacks next to those he was moving were towards him, and he did not think this tier would fall towards him, but that, if they fell, they would roll off to the side from him. From the evidence we do not find that he undermined the tiers of sacks next to the one he was removing, but only took off the tier which adjoined

the one that fell. Up to the time of the injury he was not aware of the manner in which the stack had been constructed.

"It appears from the evidence that the back tier of the stack, next to the stack with the ends towards appellee, the sacks therein for several tiers were piled one upon the other, without being tied or interlocked, and that these tiers pushed out the tier next to appellee and toppled it over on him. At least the jury were authorized to find that the failure to tie or interlock the rear sacks caused them, by reason of their weight, to force over the tier, the ends of which were next to appellee, and, if they had been tied, the sacks would not have so fallen, and that they were negligently stacked. It appears from the evidence that, after this accident, appellant caused stacks in the room to be tied or interlocked by persons then at work in that room. There is evidence to the effect that two weeks previous to the accident sacks so stacked had fallen in that room. There is evidence that in removing the sacks from the stack it was the rule at that mill, and the manager and foreman had so instructed the employees, to take the sacks down by tiers and leave the other tier with the straight wall of sacks. This, however, is denied, and there is evidence that the employees were instructed to commence removing the sacks from the top. As a matter of fact, every issuable fact in this case was controverted and the testimony thereon is conflicting. The evidence in this case tends to show that appellee had not been at work in removing sacks for tagging exceeding 30 minutes when the accident occurred, and he says that he had only removed seven or eight sacks and pulled the tags off ready for re-

tagging. The evidence shows that Holland, the superintendent, the day of the accident or the day after, told appellee that it was through appellant's carelessness that he was hurt, and that they would pay his doctor's bill, and for his time while confined, and that, if it had been his negligence, they would not do so. The evidence shows they did pay his doctor's bill, and for his time lost. We do not feel authorized, therefore, to say there was no fact which authorized the jury to find negligence, or in holding that the uncontroverted facts show that appellee was guilty of contributory negligence, and that he assumed the risk.

"As usual in cases of this character, there is a perfect wilderness of contradiction and conflicting testimony, but on that ground alone we do not feel justified in holding the verdict is without support. We do not think that it can be said, as a matter of law, that an inexperienced man, relying upon the assumption that the master knows his duty to the employees, and will perform it, would have known the manner of doing the work was not a reasonably safe one. We do not think within the 30 minutes' work that he acquired such knowledge as to apprise him of the danger he encountered in continuing the work. These questions, we think, were for the jury, and, having passed upon the facts, we do not believe we should disturb their findings. *Bonnet v. Railway Co.*, 89 Tex. 72, 33 S. W. 334. There is evidence at least tending to support the findings of the jury. The same may be said as to contributory negligence. The appellee is not shown to have conducted himself out of the usual and ordinary way of performing the work, and the testimony is that the method of re-

ducing the pile of sacks was resorted to in the instant case that had theretofore been used and directed. True, some of the witnesses say it would have been better and safer to take the sacks from the top, but at least the question for the jury to say whether an ordinarily prudent man would have acted as did appellee under the circumstances."

In the case of *Herndon v. Halliburton Oil Well Cementing Co.*, 154 S.W. (2d) 163, a Texas case by an El Paso Court, in which writ was refused, the court laid down the proposition that in Texas a doctrine of assumed risks applies only to the relationship of master and servant.

The recent case of the *City of Beaumont v. Silas*, a Texas case in which writ was refused, the Court said: 200 S.W. (2d) 695—

"Questions of *contributory negligence* of the appellee and *assumption of risk by him* presented questions of fact for the jury which were properly submitted by the court in its charge, and such issues were determined by the jury in favor of the appellee. *If the sacks of cement in this case had been improperly and negligently stacked*, thereby rendering the warehouse an unsafe place in which appellee was to work, then the rule requiring the master to provide a reasonably safe place in which its servants were to work would make the appellant liable, even though the WPA, or some other agency or person, had actually done the stacking, if the elements of negligence and proximate cause were present. The duty to provide a reasonably safe place is unassignable and nondelegable by the master. Memphis Cotton

Oil Co. v. Gardner, Tex. Civ. App., 171 S. W. 1082, and cases cited. In this case the city was found to be negligent in failing to have proper inspection of the cement stacks, in failing to warn appellee that the place was dangerous, in failing to require the cement to be stacked in a safe manner, and in failing to have proper supervision of the work appellee was immediately engaged in doing. We fail to see how the fact that the WPA had originally stacked the sacks of cement would relieve the city from its duty of providing a safe place for its workmen in the warehouse. If it was necessary to do so to make the warehouse safe, the city could have restacked the sacks of cement and could have had them stacked in the customarily safe manner. These issues were properly submitted by the court in its issues in regard to negligence and proximate cause."

The Supreme Court of Texas in the very recent case of the *Texas & Pacific Ry. Co. v. Day*, 197 S.W. (2d) 332, laid down the rule as follows: Mr. Justice Simpson said—

"Contributory negligence barring a recovery as a matter of law is a conclusion sometimes compelled by the evidence, but such cases are relatively rare. Ordinarily this question is for the trier of facts and only becomes a matter of law for the court when but one reasonable conclusion can be drawn from all the testimony. *City of Fort Worth v. Lee*, 143 Tex. 551, 186 S. W. 2d. 954, 159, A. L. R."

It is obvious that had Day been more cautious, he would not have been injured. But whether the precautions he took amounted to due care was properly left to the jury.

In this case, Kelley was removing only one stave of steel at a time. He had prepared his own lights and had requested more light and shortly after making such request, he was injured. Of course, the real proximate cause was the support having been loosened to such an extent by Head that it broke, causing the stave to fall, but the facts show that Kelley did exercise some care for his own safety and whether or not an ordinarily prudent man would have incurred this risk was, under the above decisions, a question for the jury. Under the Day case and others in Texas, it is only in a case where no care is exercised that one is guilty of contributory negligence as a matter of law.

The recent Texas Supreme Court case of *Shuford v. City of Dallas*, 190 S. W. 2d 721, the Supreme Court held that whether a pedestrian *who proceeded in the dark* and fell over an unguarded and unlighted pile of dirt in front of her home was contributorily negligent was a question for the jury, notwithstanding the pedestrian's *knowledge that the street was in the process of repairs*.

The court held, in part, as follows:

"We agree with the minority statement of the law that "even knowledge by the traveler of a street or sidewalk obstruction is not conclusive of negligence," and that the question of contributory negligence raised by the evidence is one for the jury under the circumstances of the particular case. The cases and authorities cited in the minority opinion support the principle stated. We adopt as correct the following

excerpt therefrom: "Texas courts uniformly hold that even knowledge by the traveler of a street or sidewalk obstruction is not conclusive of negligence. The question of contributory negligence thus raised is one for the jury under circumstances of the particular case. *Gulf C. & S. F. R. Co. v. Gascamp*, 69 Tex. 545, 7 S. W. 227; *City of Denison v. Sanford*, 2 Tex. Civ. App. 661, 21 S. W. 784; *Butler v. City of Conroe*, Tex. Civ. App. 218 S. W. 557. Use of a highway, though known to be dangerous is not negligence per se. *Marshall & E. T. R. Co. v. Petty*, 107 Tex. 387, 180 S. W. 105, L. R. A. 1918A, 192. Note also 39 T. J., *Streets*, Sec. 128, pp. 703, 704, and footnote of cases holding: 'But the fact that a person knows or might have known that a street or sidewalk was defective or in a dangerous condition does not necessarily impose upon him the duty of refraining from traveling thereon, or charge him as a matter of law with contributory negligence in using the way—even at night; * * * Nor does the mere fact that a pedestrian temporarily forgets an obstruction across a sidewalk convict him of contributory negligence as a matter of law,' And quoting from 43 C. J., p. 1082: 'The mere fact that one using a street or public way had knowledge of the defect or obstruction by reason of which he was injured does not, as a matter of law, constitute contributory negligence precluding a recovery, if in view of such knowledge he exercised reasonable and ordinary care under the circumstances.' (P. 1086) 'A traveler is not precluded from recovery because he knew of the defect or obstruction, where his knowledge was remote, or imperfect, or insufficient to give a full appreciation of the danger, as where he knew of the generally defective condition of the way, but had no knowledge of the particular defect which cause the injury'."

CONCLUSION AND PRAYER

The above cases fully demonstrate that the dissenting opinion of Mr. Justice Holmes is correct and that the decision and judgment of the Honorable Trial Court, to-wit, the Honorable R. E. Thomason, District Judge for the United States District Court in and for the Western District of Texas, was also eminently correct and that this Honorable Court should review this cause by granting a Writ of Certiorari and by reversing the said decision and affirming the judgment of the Honorable Trial Court.

Respectfully submitted,

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A copy of the Petition for Writ of Certiorari and brief in support thereof has been furnished the Hon. Chas. C. Crenshaw, of Lubbock, Texas, Attorney for Respondent.

.....
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IN THE
SUPREME COURT OF THE UNITED STATES

No. 211

W. R. KELLEY, *Petitioner and Appellee Below*

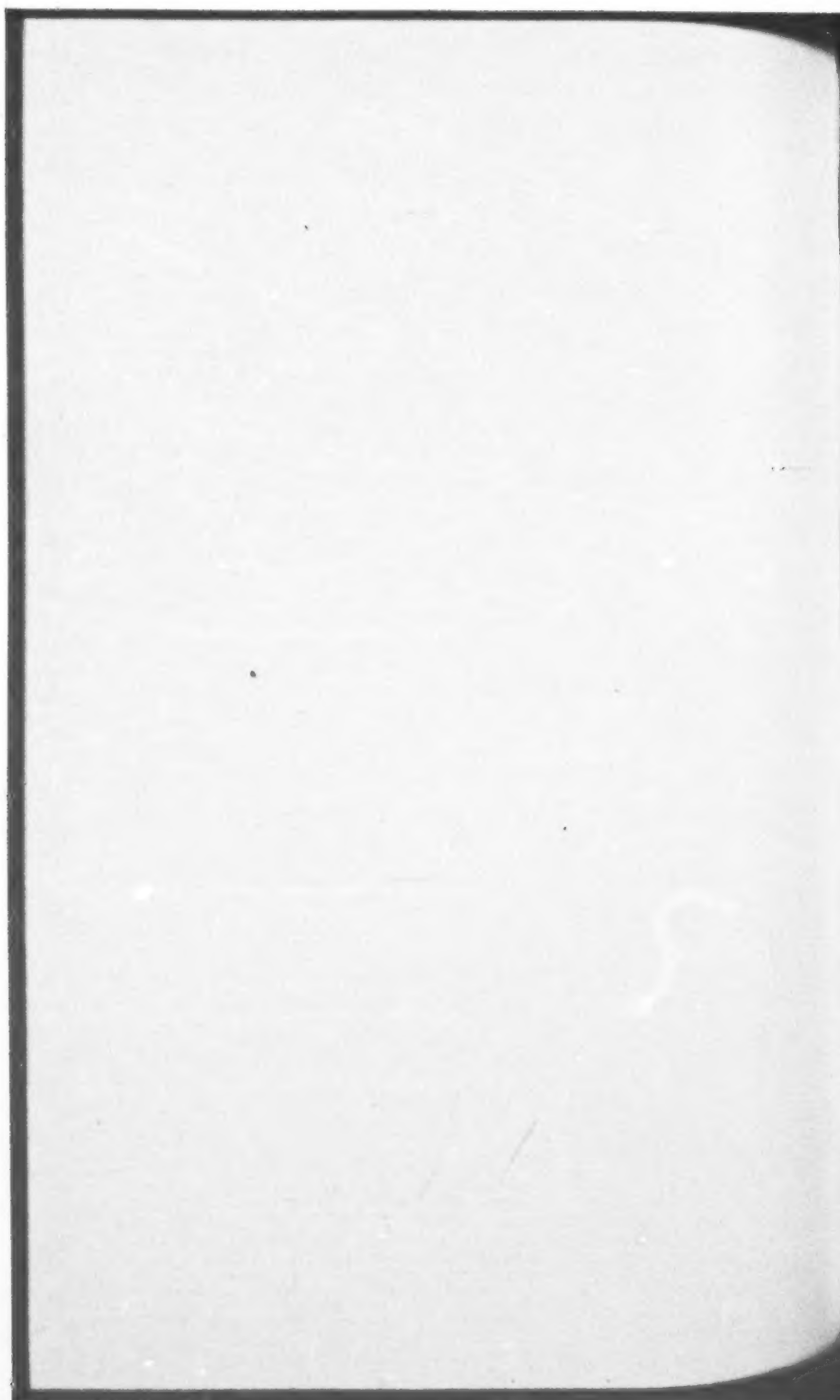
vs.

UNION TANK AND SUPPLY COMPANY,
Respondent and Appellant Below

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

W. R. KELLEY, *Petitioner and Appellee Below*

vs.

UNION TANK AND SUPPLY COMPANY,
Respondent and Appellant Below

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court of the United States:

Your Respondent, Union Tank and Supply Company, respectfully opposes the petition of W. R. Kelley, petitioner, for a writ of certiorari in the above numbered and entitled cause, and in support of its opposition, submits the following brief:

I.

SUMMARY STATEMENT OF MATTER
INVOLVED

The summary statement in petitioner's brief, pages 2-7, contains some inaccuracies and omissions, which we desire to here correct.

On page 5 of Petitioner's brief, he states:

"The Plaintiff had never before unloaded any steel of this particular type, and he testified that

since he had been requested to move the steel by *Mr. Head*, who had been working in the car that he presumed that it was safe to get in the car and take the steel out." (Rec. p. 49.)

This statement is not a correct quotation of the record. The record is as follows:

"Q. What did you see there concerning the stack?

"A. The steel was leaning there against the car, and I had no idea it could be dangerous from the way it was stacked.

"Mr. Crenshaw: We object to the witness' statement about his ideas.

"The Court: Just state what you saw, what the true situation was.

"A. The steel staves were leaning against one wall. As I had been told it had to be moved, I presumed it was safe to get in and take the steel out." (Rec. pp. 48-49.)

It will be noted that the witness did not say that he had been told by Mr. Head to move the steel. On page 47 of the Record, the witness testifies as follows:

"Q. Had you had any direct conversation with Mr. J. O. Head at all?

"A. No, sir.

"Q. You, yourself?

"A. No, sir.

"Q. Had Mr. Head said anything to you at all about the work?

"A. No, sir." (Rec. p. 47.)

This same statement of petitioners is repeated in the

last paragraph on page 47 of his brief to the effect that Head ordered him to finish unloading the car at night, which equally is unsupported by the testimony. There are other inaccurate statements made by petitioner in his brief supporting his petition for the application for the writ of certiorari, which we will not undertake to here correct, but will call to the Court's attention in our reply to such propositions and arguments.

We believe that in the notes subjoined to the opinion of the Honorable Circuit Court of Appeals for the Fifth Circuit, a fair and sufficiently comprehensive statement is made of the salient facts, and since the petitioner does not in his brief in any way question the accuracy of this statement, that we may simply refer to such a statement, and make it a part of this brief, without the necessity of here recopying same. We therefore here refer to and adopt the statement of the record facts as contained in notes subjoined to the opinion of the Honorable Circuit Court of Appeals as a correct statement of the salient facts shown by the record in this case, and ask the Court to consider the same.

We believe, however, it will aid the Court to a clearer understanding of the situation if we briefly inform the Court just how this carload of tank steel was loaded; how the supports were arranged; the usual and customary manner of unloading; and what the petitioner's version of the accident was:

The tank steel being unloaded consisted of sheets of steel from one-eighth ($1/8$) to three-sixteenths

(3/16) inches in thickness, the weight of which was variously estimated at from 185 to 235 pounds (Rec. p. 169.) Petitioner Kelley testified that each sheet weighed approximately 500 pounds (Rec. p. 60.)

The usual and customary way of loading the steel for shipment in a box car was as follows:

That a 2 x 4 or 2 x 6 or 4 x 4 timber would be nailed against the end wall of the car at about four feet above the floor; that the sheets of steel were about five feet by eight feet, and slightly curved, and that each end had a chine or flange at a 90° angle to the sheet with holes near the top and bottom. That a sheet would be taken into the car and set upon its edge with the eight foot length of the sheet running parallel with the side walls of the box car, and a nail would be driven through one of the upper holes in the flange and into the timber that had been nailed across the back end of the car to fasten the sheet in an upright position. That this process would be pursued until the sheets filled the car from one side of the car to the other; every other sheet being nailed to the timber at the back end of the car. That then, at the end of the sheets, toward the center of the car, a 4 x 4 timber would be nailed into the side walls of the car, across the car, at a point about four feet above the floor, and a nail would be driven through one of the upper holes in the flange in the upper end of the sheets into the 4 x 4 to keep the sheets in an upright position, and also at the bottom of the ends of the sheets, toward the center of the car, a piece of timber would be nailed on the floor across from one side wall to the other to

prevent the sheets from slipping back and forth lengthwise in the car (see testimony of Hobson, Rec. pp. 169-171).

That the usual and customary method of unloading the sheets of steel was to tear out the timbers in the front, or toward the center of the car. That after that was done, it was usual and customary to start unloading the sheets from one side of the car, and take the sheets out one at a time. That in order to break the sheets loose from where they were fastened to the timber at the back end of the car, the workman would take a hook and put it in one of the bottom holes of the flange at the front end of the sheet, and lift the front end up about a foot high, and then let it drop back down, which would ordinarily pull the nail out at the back end of the sheet, and the workman would then pull the sheet toward the center of the car. That if this procedure did not pull the nail out, the usual and customary method was for the workman to go over the top of the sheets to the back end and pull the nail with a claw-bar. That the only way these sheets could fall on a workman and pin him against the side of the car would be for the workman, after he had unloaded a number of the sheets, to go in between the remaining sheets and the side of the car. (Rec. pp. 172-174.)

As to the condition of the steel in the car at the time Appellee went to work there, there is an irreconcilable conflict in the testimony. Appellee's witness, Joe Head, testified that before Appellee went to work in the car that he, Head had gone in there and torn out all of the supports around the tank steel in the end of the car,

leaving it free to fall or to be handled. (Record pp. 106-107.) That he tore out the 4 x 4 that was at the front end of the staves (Record page 130) and that the 2 x 6 at the back end was not against the end of the car, but was out some eighteen to twenty inches from the back end of the car (Record page 133); and that he crawled over the staves or steel sheets and took the 2 x 6 out from the back end and pulled loose the nails that held the steel sheets to this 2 x 6 (Record p. 134), leaving the staves without any nails holding them at either end.

Petitioner Kelley testified that when he and his fellow worker (a Mexican) started unloading these sheets of steel, that they would take their hook and put it in the hole close to the bottom at the front end of the sheet and pull the sheet of steel up and break it loose at the back end of the box car and drag them out. That there was a nail driven through the flange and into the 2 x 4 at the end of the car. That he saw the whole situation and knew the 2 x 4 was back there (Record page 65); that some of the sheets were nailed into the 2 x 4 at the back end of the car, and some were not. That he saw those that were nailed and saw some that were not nailed (Record pp. 67-68). That at the time he got hurt, he had gone back into the car to pull the nail out of the sheet of steel and was coming back toward the front end of the car when the steel fell and lodged him against the side of the car. (Record p. 49.) Bruce Wimberley, a witness for Respondent, testified that the sheets of steel were nailed to a 2 x 4 at the back end of the car, and there was a 4 x 4 at the front or east end of the car, the 4 x 4 being toward the top

of the steel, and that at the bottom of the sheets a 2 x 4 or 4 x 4 was nailed to the floor at the front end of the sheets. That the 4 x 4 at the top in front of the sheets was nailed in pretty solid, and he and Kelley and the Mexican pulled it out with a winchline that was on his truck, and that the timber at the bottom of the steel sheets at the front end was pried up with a bar, and that Kelley and his helper did that work. (Record page 185.) This testimony of Wimberley was not denied by Petitioner, Kelley. Wimberley further testified that he was there off and on all the time that Kelley and his helper were working in the car, and that Kelley and his helper in unloading the car would pull the sheets loose where they were nailed to the cross-piece at the back or west end of the car. (Record page 186.)

Petitioner, Kelley, testified that the steel he was unloading was at the east end of the car (Record page 60), whereas Petitioner's witness, J. O. Head, and Respondent's witness, Wimberley, both testified that the steel Kelley was unloading at the time he was injured was in the west end of the car. (Record page 120 and 182-183.) In using the words "East" and "West" in the preceding paragraphs, we are not attempting to resolve that conflict in the testimony, but merely adopting the testimony of Head and Wimberley as to location of steel in the car merely for convenience in making a clear description of the points where the braces or supports were located.

Petitioner, Kelley, in addition to the portions of his testimony hereinabove set out testified in substance

that he was approximately twenty-eight (28) years of age at the time of the accident. That on the day of the accident he was working for Bruce Wimberley unloading some tank steel from a boxcar. That he had never unloaded any tank staves from a boxcar before. That he had been working for Mr. Wimberley approximately a month or better at the time of the accident. That he went into the car with a Mexican helper to unload the steel and that at the time of the accident they were both tired and were trying to get the steel out as soon as possible. "They had nailed the steel. It was back in the car, and I had gone back to pull this nail out of the sheet of steel, coming to the front end of the car. Before I got to the front the steel fell and lodged me against the opposite side of the car." (Record pp. 45-49.) That during the month or more before the accident, while he had been working for Wimberley, he had been hauling pipe mostly. That some of the pipe would be heavy and some medium weight. That he also moved many heavy pieces of machinery, some much heavier than the sheets of steel he was moving at the time of the accident. That he had also worked for another trucking concern before going to work for Wimberley, and had been engaged in the business of hauling in the oil fields approximately a year prior to the accident. That he had also had experience working as a roughneck in the oil fields, keeping the machinery oiled and greased, keeping the rig clean, and filling in on the other heavy work, such as tearing down rigs and putting rigs up. (Record pp. 53-55.) That about noon on the day he got hurt, Wimberley told him he had a job unloading the car, and

told Appellee and the Mexican to go down and start unloading the car. That they went down around 1:30 in the afternoon. That he and the Mexican went in under Wimberley's orders to unload the car, and there was no one else present. That at the time he started unloading, he could not get in on either side of the steel. That when they started, they would put hooks in the holes in the sheet and pull them out and then take them over and put them in the truck. That the way they broke them out would be to put the hook in a hole close to the bottom, pull the sheet up, break them loose from the end of the car and take them out. That there was a nail through the steel into the 2 x 4. That he knew the 2 x 4 or 2 x 6 was back there, and they had to handle the sheets from the front. That as soon as they pulled out enough so that one of them could get back in there, he went in between the sheets and the side wall of the car eight or ten times before he got caught and hurt. That he had been back in there some eight or ten times in daylight and did not need any light to see the conditions there at that time. That some of the sheets were stuck into the floor of the car at the back end, and they would sometimes have to go back in there to break them loose. That some of the sheets were nailed to the 2 x 4 and some were not; that those that were nailed, he saw them nailed and he saw some that were not nailed into the timbers when he went back there in broad daylight. That as he took the sheets out he could see that they were leaning; that on their first load they carried, as he recalled, twenty sheets. That he had worked there from about 1:30 until the time he carried the first load up to the

yard of the Union Tank and Supply Company and unloaded it. That it was about dusk when they left the supply company yard, and he went by and got his supper, and waited for the Mexican to come back, and then went back for the remainder of the stuff. (Record pp. 59-68.) That when he went back to the car he found the unloaded portion of the material in the same condition as it was when he left. That Bruce Wimberley told him to work that night and finish unloading the car; that he lacked a small portion of unloading the car. That Joe Head was in a conversation with Wimberley about four o'clock in the afternoon, and Head was outside the car when Wimberley told Appellee to finish the car that night. That Head did not say anything direct to Appellee about the matter of unloading, but he heard him talking to Wimberley, telling Wimberley that it had to be unloaded that night. That when he went back there he had gotten two or three sheets on his truck before the accident took place. That when he went back to work that evening there was a light on the headache bar of the truck and he rigged up the light and turned it into the boxcar. That it was his own light and he had put it on the truck himself to use in just such occasions as this and trained it just where he wanted it to go. That with the light trained in there he saw how to get out the two or three pieces and then after that time he got caught between the side wall of the box car and the steel. That Mr. Wimberley and several other men came in and lifted the steel and got him out and into Wimberley's car. That at the time of the accident there were twenty-three (23) sheets of steel left in the car. That the

light that he had was not sufficient and he asked Mr. Wimberley to get him one, and Wimberley said he would ask Mr. Head. That Joe Head was not there at the time that he knew anything about. That after Wimberley said he was going to see Mr. Head, Appellee continued working there with the light that he had. That he would say that it was around 9:00 or 9:30 o'clock when he got back to the car and was after dark. That it was pitch dark in the box car. That after he had trained his light it was still too dark to work in there, but that despite the fact that he knew he did not have adequate light, he went in there and got caught. (Rec. pp. 69-82.) That at the time of his asking Mr. Wimberley about the light, he had not seen Mr. Head around there since about 4:00 o'clock that afternoon, and that Mr. Head was not around there at the time of the accident and that Mr. Head had not been around for about six hours before the accident. (Rec. p. 98.)

II.

PROPOSITION I

ANSWERING SUBDIVISION "A" OF SECTION VI
APPELLEE'S BRIEF (pp. 38-40)

The evidence without dispute showing that no representative, agent or employee of respondent, or its predecessor, Crawford Tank and Supply Company, was present at the car where the accident occurred for more than four (4) hours preceding the accident, and there being no showing that at the time the representative of Crawford Tank and Supply was present at the car some four (4) hours or more prior to the accident, that he saw or observed Petitioner in any then imminent or impending peril, the evidence was wholly insufficient to authorize the submission to the jury of the issue of discovered peril or to support a jury verdict based thereon; and the Honorable Circuit Court of Appeals correctly so held.

STATEMENT

There was no evidence that any agent or representative of the Crawford Tank and Supply Company, the predecessor of respondent herein, Union Tank and Supply Company, was present at the scene of the accident at the time of or for some hours preceding the accident, or that any agent or representative of said company saw the plaintiff at the time of or as he was proceeding to go in between the sheets of steel and the side of the car, or that at the time Head, the representative of Crawford Tank and Supply Com-

pany, was at the car, according to his testimony, about 7:30 in the afternoon, and some three or more hours before the accident, that he saw or observed Kelley at any time go in between the sheets of steel and the side of the car.

The evidence, on the contrary, shows affirmatively that none of the agents or representatives of the company were present or saw the Appellee at or shortly before the accident.

Apparently the only two representatives of Crawford Tank and Supply Company were J. O. Head and Jerry E. Hobson (see Record). There is no evidence that Hobson was ever at the car involved in the accident at any time. (See Record.)

The Appellee, Kelley, testified "that the accident happened at approximately 10:30 P. M. the night of April 27." (Rec., second Q. and A. from top of p. 46.)

Appellee, Kelley, further testified as follows:

"Q. You asked who about getting more light?

"A. Asked Mr. Wimberley.

"Q. You had not seen Mr. Head around there at all since about 4:00 o'clock that day?

"A. No, sir.

"Q. Had you?

"A. No, sir.

"Q. Following up that last question, Mr. Head, Mr. J. O. Head, or Joe Head, was not present in the box car or around there at the time the accident happened, and had not been in that box car or around there for several hours, had he?

"A. He was not around there at the time of the accident, No sir.

"Q. And it had been several hours before that time? If it happened, if the accident had happened about 9:30, Mr. Head had not been around there since 4:00 o'clock that afternoon, had he?

"A. The accident happened approximately about 10:30, and I had not seen Mr. Head in quite some time myself.

"Q. Well, about six hours had elapsed, is that right?

"A. Approximately that long." (Rec. p. 98.)

Petitioner's witness, J. O. Head, testified as follows:

"Q. Now after he undertook and began unloading did you go back there at any time?

"A. Yes sir.

"Q. Did they, to your knowledge, or not, work during the night time.

"A. I quit about 7:00 or 7:30 on the car I was working on, went by there, and they were still working, and they came after their third load, was backed up to the car—second load I mean to say instead of the third load. I stopped by to see how they were getting along, and they lacked a load of staves of having them out, and I told them to go ahead and finish them.

"Q. About what time?

"A. As well as I remember, around 7:00 or 7:30." (Record p. 106.)

The same witness further testified as follows:

"Q. And when this accident took place, were you there?

"A. No, sir.

"Q. How long had it been since you had seen

Kelley and Wimberley or the car if you know?

"A. From about 7:30 until about—I will say 7:30 the next morning.

"Q. You didn't know anything about the accident that night, did you?

"A. No, sir.

"Q. And you were not around there at any time that night.

"A. No, sir." (Rec. pp. 121-122.)

ARGUMENT

It is settled law in this State that before the doctrine of discovered peril can have any application the evidence must show that the defendant or its agents actually discovered the plaintiff's perilous condition. It is not enough that they should have discovered the perilous condition, but failed to do so, but there must be an actual discovery by the defendant or its representatives of the perilous condition of the plaintiff in time that they can, by the exercise of reasonable care, have avoided the accident.

Turner vs. Texas Co., et al., 159 S. W. 2d, 112 (Sup. Ct.).

Panhandle & Santa Fe Ry. Co. vs. Napier, 143 S. W. 2d, 754.

East Texas Theatres, Inc. vs. Swink, 177 S. W. 2d 195..

Texas & P. Ry. Co. vs. Breadow, et al (Sup Ct.) 36 S. W. 410.

Texas & P. Ry. Co. vs. Staggs, et al (Sup Ct.), 39 S. W. 295.

In *Turner vs. Texas Co.*, supra, the Commission of Appeals in an opinion adopted by the Supreme Court thus expresses the rule in Texas:

"Actual discovery of the perilous position of the plaintiff is essential to recovery. It is not enough that the one inflicting the injury should have discovered the peril of the person injured or that he was negligent in not discovering it. Associate Justice Denman in *Texas Pacific Railroad Company vs. Breadow*, 90 Texas, 26, 31, 36, S. W. 410, 412, states this rule as follows: 'the principle, however, has no application in the absence of actual knowledge on the part of the person inflicting the injury, of the peril of the party injured in time to avoid the injury by the use of the means and agencies then at hand. If he had no such knowledge, the new duty was not imposed, though it be clear that by the exercise of reasonable care he might have acquired same. The burden of proof was upon plaintiff in this case, in order to recover for a breach of such new duty, to establish, not that the employees might, by the exercise of reasonable care, have acquired such knowledge, but that they actually possessed it.' " (Citing Texas cases.)

It has been further held, and is settled law in the State of Texas, that in order to come within the definition of discovered peril, the peril of the injured party must have been imminent and impending.

In the case of *Texas & P. Ry. Co. vs. Staggs, et al*, the Supreme Court of Texas had before it a case where the railroad train operators discovered Staggs upon the track between a quarter and a half mile in front of the moving train. Complaint was made that the

employees of the railroad company failed to use ordinary care to discover, that the deceased would not leave the track in time to prevent injury to him, and the trial court charged the jury upon that theory. The Supreme Court reversed the ruling of the trial court, and held that discovered peril was not in the case.

In the case of *Texas & P. Ry. Co. vs. Breadow*, supra, the Supreme Court had before it the question of discovered peril, where the injured party was seen walking down alongside the railroad track, and contention was made that the issue of discovered peril was in the case. In answering this contention, the Supreme Court said that discovered peril was not in the case.

In the case of *Schaff vs. Gooch*, 218 S. W. 783, the Austin Court of Civil Appeals had before it a contention that discovered peril was an issue because the employees of the railroad company discovered the injured party walking near to the track and, therefore, they knew there was danger of his getting on the track.

The Court, in rejecting the contention that discovered peril was in the case, made this statement:

"The rule of law is well settled in this State, that in order for a recovery to be had under the doctrine of discovered peril, which eliminates the defense of contributory negligence, it must be made to appear that the injured party was *in a position of imminent danger*, and that the defendant or those acting for him discovered the dangerous situation of the injured party in time to have averted the injury by the exercise of proper care."

In *Schaff vs. Copass*, 262 S. W. 234, the Austin Court of Civil Appeals, in passing on the question of whether the issue of discovered peril was in the case said:

"The duty (of using care) thus imposed (by discovery of the peril) arises out of the immediate situation and is entirely independent of and aside from the causes which have created it."

In *Northern Texas Traction Company vs. Hill* (C. C. A.), 297 S. W. 778, (Writ of Error refused by Supreme Court), the Court held that "the doctrine of discovered peril defeats the defense of contributory negligence on the part of the plaintiff only when the danger arising therefrom is imminent, is actually discovered by defendant and may be arrested by means at the latter's command."

In the case of *W. A. Morgan & Bros., et al vs. Missouri, K. & T. Ry. Co. of Texas* (Sup. Ct.), 193 S. W. 134, the Court had this to say upon the issue of discovered peril:

"It is unnecessary to enter upon an extended examination of the abstract question of whether the doctrine of discovered peril applies to the injury or the destruction of inanimate property, to which an elaborate and able written argument by counsel for the plaintiffs in error is largely devoted. With us, the doctrine defeats contributory negligence on the part of the plaintiff only when the danger arising therefrom is imminent, is actually discovered by the defendant, and may be averted by the means at the latter's command."

The mere fact that there was a possibility of injury to petitioner and that possibility was seen and realized by the representative of Appellee is not sufficient unless the danger was then imminent and impending. The fact that some three or four or more hours prior to the accident that a representative or respondent saw Kelley working in the car, without any proof that he saw him going in between the sheets of steel and the side wall of the car, is not such a discovery of imminent and impending peril as would invoke the doctrine of discovered peril or make it applicable to this case. It is plainly evident that as long as Kelley continued to get hold of the sheets at the front end, or the end toward the center of the car, and pulled them out toward him without going in between the sheets of steel and the side wall of the car, that he was in no danger of the sheets falling on him. Therefore, in order to show a discovery of any perilous condition, it would be necessary for the evidence to show that Head saw him go in between the sheets of steel and the side wall of the car. The record is completely silent on this feature, and there is no testimony showing that Head saw him at any time go between the sheets of steel and the side wall of the car. Therefore, if it could be said that the discovery of a perilous position three or more hours before the accident was such a discovery as would bring into play the doctrine of discovered peril, in this case there is no evidence at all upon which that theory can have any support. In the argument on the issue of discovered peril, petitioner states that Head's testimony was to the effect that he went by and told Wimberley and

Kelley to complete the work that night. This statement is not supported by the record. Head does not claim that he talked to Wimberley in *Kelley*'s presence about working at night, and *Kelley* himself says that Head never gave him any orders whatsoever, or instructions whatsoever. (Rec. p. 69 where *Kelley* said that Bruce Wimberley was the man who told him to work at night.) Again in the fifth line from the end of Petitioner's argument on the issue of discovered peril, he states that Head, by refraining from *ordering Kelley* to continue to work under certain dangerous conditions in the night time, etc., this statement is likewise incorrect, as is shown by the above excerpts from the testimony.

We submit that the Honorable Circuit Court of Appeals correctly held that the issue of discovered peril was not in the case, and that the trial court erred in charging the jury thereon.

PROPOSITION II

ANSWERING SUBDIVISION "B" OF PETITIONER'S ARGUMENT, pp. 40-47 OF ITS BRIEF

The evidence was insufficient to authorize submission of the issue of negligence in failing to furnish a safe place to work, such as an adequately lighted place, and the Circuit Court of Appeals correctly so held.

STATEMENT AND ARGUMENT

We will ask the Court to consider hereunder the preliminary statement of facts hereinabove set out, and the statement of facts set out in Note 4 to the opinion of the Honorable Circuit Court of Appeals, the correctness of which has not in anywise been questioned by Petitioner herein.

Appellee alleged that he was a business invitee in the car in question by virtue of having been an employee of one Bruce Wimberley, who then and there had a contract to unload a car of steel for the Appellant. (Paragraph 3, Plaintiff's First Amended Original Petition, Rec. p. 27.)

The undisputed testimony of Wimberley and Head established that Wimberley was an independent contractor (Rec. pp. 104-105, and 181-182).

Under the decisions in Texas, the employee of an independent contractor is merely an invitee upon the premises, and the contractor does not owe him the duty of furnishing him a safe place to work.

In *Harrison vs. Harrison*, 100 S. W. 2d 780, the Court said:

"In our opinion, the duty of an employer to provide an employee with reasonably safe tools and appliances, and a reasonably safe place in which to work is a duty incident to the relation of master and servant, employer and employee, and not to the plaintiff as an invitee."

In principal the foregoing rule is applied in the case of *Humble Oil & Refining Company vs. Bell, et al*, 180 S. W. 2d 970.

The Honorable Circuit Court of Appeals for the Fifth Circuit has apparently recognized this to be the Texas rule in the case of *Holt vs. Texas-New Mexico Pipeline Company* (C. C. A. 5th), 145 Fed. 2d 862, where it held that Holt, as an employee of the contractor, was an invitee upon the premises of the pipeline company. We think that this holding that the employee of an independent contractor is an invitee upon the premises of the contractee is also implicit in the decision by the Honorable Fifth Circuit Court of Appeals in the case of *Kuptz, et al vs. Ralph Sollitt & Sons Construction Company* (C. C. A. 5th), 88 Fed. 2d 533.

We believe the rule contended for by petitioner, that one who employs an independent contractor to do work on his premises, and surrenders control of the premises to the independent contractor, owes to the employees of such contractor the duty of furnishing them a safe place to work, is manifestly too broad. Certainly where one employs an independent contractor to construct a building, or to demolish a building, or to dig an excavation, or to move heavy materials in

and out, where the condition of the premises is constantly changing or the dangers are increased by the progress of the work, it would hardly be contended that the owner owes the servant of the independent contractor the duty of furnishing him a safe place to work.

We think the true rule is correctly announced in the case of *Armour & Co. vs. Dumas*, (C. C. A.), 95 S. W. 710 (Writ of Error denied by Supreme Court) where the Court said:

"But it is insisted that the duty of exercising care to furnish a reasonably safe place to work, resting upon Appellant, was absolute and non-assignable. But to this general rule there is the well known exception that the master is not liable where the danger to which the employee is exposed is merely a transitory one, due to no fault of plan or construction, but is one where the work is of such a character that as it progresses the environment of the servant must necessarily undergo frequent changes, and the injury is traceable to one of those transitory changes."

In the case at bar, the evidence is undisputed that at the time Kelley began his work that he could not go in between the sheets of steel and the side wall of the car; that as the work progressed to where he had removed a sufficient number of sheets, he was then able to go in between the sheets and the side wall of the car. Up to that time, there was no danger of injury by the sheets falling. As the work progressed, and more sheets were removed, there was greater opportunity and danger of the sheets falling and catch-

ing Kelley between the sheets and the wall of the car. The danger which occasioned this injury arose as a result of the changing conditions of the work.

The rule contended for by Petitioner herein would put upon the person employing an independent contractor all the duties of the master toward the servant. In the case at bar, the contractee did not agree to furnish any materials or appliances or equipment and completely surrendered control of the car and its contents to Wimberley, the independent contractor, and his employees.

We believe it is a settled rule in this state, as shown by the authorities above quoted, and others not necessary to cite, that as between the contractee and the employee of the independent contractor, there merely exists the relation of the owner of the premises and of an invitee thereon.

This distinction is of importance, because the duties owed by the owner of the premises to an invitee are much less onerous than the duty owed by a master to his servant to furnish him a safe place to work.

The rule is very clearly stated in the case of *Crump vs. Hellams*, 41 S. W. 2d 288, and copied in Vol. 30, Tex. Juris., Section 184, page 870, as follows:

"The mere ownership of land or building does not render one liable for injuries sustained by persons who have entered thereon or therein; the owner is not an insurer of such persons, even when he has invited them to enter. Nor is there any presumption of negligence on the part of an owner or occupier merely upon a showing that an injury has been sustained by one while right-

fully upon the premises. The true ground of liability is the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to persons going upon the property. It is when the perilous instrumentality is known to the owner or occupant and not known to the person injured that a recovery is permitted. In the language of Mr. Justice Harlan, the owner is liable to invited persons for injuries 'occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them and was negligently suffered to exist without timely notice to the public, or to those who were likely to act upon such invitation.' And, hence, there is no liability for injuries from dangers that are obvious or as well known to the person injured as to the owner or occupant."

In the case of *Fort Worth & D. C. Ry. Co. vs. Hambright*, 130 S. W. 2d 436 (Writ of error dismissed), Hambright was an invitee on the premises of the railway company and slipped on some ice and was injured. The Court said:

"The only condition under which such an owner is liable to those whom he invites upon his premises are when dangerous and unsafe instrumentalities or conditions exist and are known to him, and not known to such invited persons, and they are injured by such instrumentalities and conditions. It follows that if a person is injured under such circumstances, and the instrumentality or condition by which he was injured is as obvious and well known to him as it is to the owner of the premises, no liability exists for such injury and the law will allow him no recovery therefor."

To the same effect see:

Shawver vs. American Ry. Express Company,
236 S. W. 800.

Crumpp vs. Hellams, 41 S. W. 2d 288.

G. H. & R. Ry. Company vs. McLain, 218 S. W.
65.

Texas & Pacific Ry. Co. vs. Howell, 117 S. W.
857.

In a very recent decision by the Supreme Court of this State, in the case of *Houston National Bank vs. Adair*, 207 S. W. 2d 374, where an invitee had fallen on a stairway in the bank, the Court held that where the evidence showed that the improper lighting of the stairs, the failure to cover or corrugate the stair tread, the absence of hand rails, and the fact that the balustrades on the sides of the stairs were too wide to be grasped from above were open, apparent and obvious to the bank's business invitee when she started down the stairs, necessitated a judgment for the defendant bank.

In *Hasuman Packing Company vs. Badwey* (C. C. A.), 147 S. W. 2d 856, it was held where the invitee who fell in descending from a truck where he had been invited to inspect some meat knew or by the exercise of ordinary care should have known that the truck floor was defective and slippery, that there was no hand hold at the rear of the truck, and only one step between the floor and the ground, that the owner was not liable for the injuries sustained by the invitee, since such defects were open and obvious.

In principle, we think this rule is given application by the Honorable Circuit Court of Appeals for the Fifth Circuit in the case of *Kuptz, et al vs. Ralph Sol-litt & Sons Construction Co.* (C. C. A. 5th), 88 Fed. 2d 532.

There is a conflict in the testimony as to whether the timber at the back end of the car to which the sheets were nailed had been removed or not; Head testifying that it was, and Petitioner, Kelley, testifying to facts which contradict that statement, in which testimony he was corroborated by the testimony of Appellant's witness, Wimberley.

Regardless of which version is accepted, the fact remains that Kelley testified that while he was working in there that afternoon he could see everything in the car; that he saw the sheets that were nailed in the back; saw those that were not nailed; saw their position, as to whether they were upright or leaning, and if leaning, which way they were leaning. If Head's version is true, and the sheets were completely loose and free to fall, that condition was open and obvious and was seen, or could have been seen by Petitioner by exercise of ordinary care. Petitioner testified that he went in between the sheets and the wall of the car, and to the back end of the car eight or ten times during the afternoon in daylight. If the back support had been removed, there was no reason on earth why he could not have seen it. If it was still there, then equally so, he could have seen it.

Petitioner is bound to have known the effect of gravity and if the sheets of steel were standing loose

with nothing to hold them in position, and in an upright or near upright position, that they might fall against him if he went in between the sheets and the wall of the car. There was no hidden or concealed danger here. Everyone knows that heavy materials unsupported can fall. The condition of these sheets, if they were unsupported, was perfectly visible and apparent.

In the case of *Willis vs. Skinner, et al* (Sup. Ct. of Kansas, 1915), 147 Pac. 60, plaintiff was assisting in unloading heavy marble slabs from a wagon. In doing so, one of the slabs fell over against him and injured him and he sued. The contention was made by the injured claimant, as it is here, that he was inexperienced and did not know of this danger, and should have been warned of it. The Supreme Court of Kansas disposed of the contention in the following language:

"In the brief, Counsel say that he was a farmer, who, though in the employ of the defendant for a year, had worked for the most part at assisting in unloading grain from a car, and that he had never before assisted in unloading marble slabs. He had, however, assisted in carrying into the building some of the slabs, and he knew their weight. The fact that they were marble instead of iron or some other heavy material can furnish no excuse for his not knowing what every man knows of the laws of gravitation."

See also:

Hyland vs. Seaver (Mass.), 45 N. E. 2d 835.

O'Brien vs. Boston & M. R. R. (Mass.), 164 N. E. 446.

Involved in this question of a safe place to work is also the question of adequate lighting. The trial court in submitting the issue to the jury as to whether Appellant had failed to furnish Appellee a reasonably safe place to work; used the phrase "such as an adequately lighted place."

In view of the undisputed testimony that Wimberley was an independent contractor, and that under the contract, Respondent was not to furnish any tools, equipment or appliances, and the testimony of Head that after Wimberley took over the car there that he did not have anything to do with the unloading (Rec. p. 132), and of Wimberley that after he and Head had made their trade, and he started to unload the steel, that no one else exercised any control over the car (Rec. p. 194), we do not believe that any duty rested on Respondent to furnish lights. Where the owner turns over a job to an independent contractor, and the contractor is to furnish the facilities, and the owner is not obligated to furnish any tools or equipment, we do not believe there is any legal justification for holding the owner liable for failure to furnish lights.

Furthermore, there was no evidence at all to show that Head knew that Wimberley was not furnishing sufficient lights. The testimony shows that Head, according to his own evidence, was last at the car about 6:30, 7:00 or 7:30 o'clock P. M. There was no showing that anyone communicated with Head and told them they did not have sufficient light. The nearest the evidence comes to that is Kelley's testimony that he told Wimberley that the light was insufficient

and Wimberley said he would see Head about it. If Wimberley was advised that the light was insufficient, and believed Head to be under any duty to furnish light, his failure to communicate with Head would be the negligence of Wimberley and not the negligence of Head. Certainly no duty arose on the part of the respondent to furnish light unless they knew or had been advised that there were no lights, or that the lights furnished by the independent contractor were insufficient.

Furthermore, on the question of insufficiency of lights as a failure to furnish a reasonably safe place to work, the evidence shows that that condition was as open and obvious to Kelley as it was to anyone else, and he admits in his testimony that although he knew the light was insufficient, he continued to work. Certainly under these circumstances, it cannot be contended that Respondent was guilty of negligence in failing to furnish the lights.

The cases cited by Petitioner, on pages 40-46 of his brief, are readily distinguishable. All of the cases fall into one of two classes: (1) where the danger was a latent or concealed one, not obvious to the injured party, such as *Amacker vs. Kelley Oil Company*, 132 Fed. 431, *Crowe vs. Continental Oil Company*, 100 Fed. 2d 292, and (2) where the employer is carrying on work concurrently with the independent contractor, and thereby creates danger to the employees of the independent contractor, such as *Montgomery vs. Houston Textile Mills*, 45 S. W. 2d 140, *Galveston & Houston Electric Railway vs. Reinle*, 258 S. W. 2d 803, *West Texas Utilities Company vs. Renner*, 32 S. W.

2d 868. Or (3) cases where the doing of the work inevitably results in injury to a third party, such as *North American Dredging Company vs. Pugh*, 196 S. W. 255. In that case, the dredging company employed an independent contractor to dredge a ditch for them, and the only place where the material gathered up by the dredge could be dumped was on the land of an adjoining landowner. The court of course held that the dredging company could not absolve itself of liability of damages to the adjoining landowner by employing an independent contractor.

We think the last statement in the quotation made by Petitioner from the Amacker case shows how clearly it is distinguished from the case at bar, wherein the Court says:

"It would serve no useful purpose to canvass and discuss the many authorities appellant and appellee cite. It is sufficient to say that the doctrine appellee invokes does not apply to this case *where the work is static* and precautions against injury from it can be easily taken."

In the case at bar, the work was not static. The danger arose as the sheets were removed and as more and more of them were removed, enabling Kelley to go between the sheets and the side wall of the car. The work was constantly changing as the sheets were removed; and the condition of danger changed as the sheets were removed. The work was not static, and therefore the Amacker case is not applicable.

The case of *Sun Oil Company vs. Kneten*, 164 Fed. 2d 806, is readily distinguishable for the reason that

the facts show that the oil company had three boilers set in series and connected with pipes through which steam might pass from one boiler to another. The oil company employed an independent contractor to clean the boilers. While he was cleaning one of the boilers, the valve on the steam pipe entering the boiler would be cut off so that the cleaning could be done with safety, and the oil company continued to use the other two boilers in the prosecution of their work. In some manner, while he was cleaning one of the boilers, the valve on the steam pipe entering the boiler became open and steam entered the boilers, scalding deceased to death. This was a case where the master was carrying on his work concurrently with the work of the independent contractor, and by a new act of negligence, that is, the opening of or failure to see that the valve into the boiler where the deceased was working was kept closed, the deceased was injured.

The same thing is true with reference to *West Texas Utilities Company vs. Renner*, supra, and *Galveston & Houston Electric Railway Company vs. Reinle*, supra, and *Montgomery vs. Houston Textile Mills*, 45 S. W. 2d 140. Petitioner's statement at the top of page 46 of his brief that,

"We have here a situation where the work of the defendant was being carried on connectedly and concurring with the work of the independent contractor."

is not supported by anything in the record. The testimony without dispute shows that after Head made his contract with Wimberley to unload the balance of

the steel in this car that he left, and that Wimberley had full charge and control over the car from that time on, and that the respondent was not carrying on any character of work in connection with, or concurring with the work of the independent contractor at this car.

Near the bottom of page 46, Petitioner makes the statement in his argument "one could not look at the steel and see that the supports had been removed since the supports were hidden in between the staves of steel, and would have had the appearance of safety to an inexperienced man, such as Kelley."

This statement is likewise unsupported by any evidence in the record. The undisputed testimony shows that the only supports that were on these staves of steel was the 2 x 4 or 2 x 6 at the west end or back end of the car, to which the staves of steel were nailed, and two 4 x 4 at the front end of the staves, or the end towards the center of the car, and that there were no supports between the staves of steel. Counsel for petitioner attempted to make this argument in the Circuit Court of Appeals and Judge Waller called his attention to the state of the record and counsel for petitioner in his first supplemental brief filed with the Circuit Court of Appeals admitted that he was in error in making such a statement and argument. We are surprised that he again now reiterates this same argument.

If he intends by that argument to convey to this court the idea that the 2 x 6 or 2 x 4 at the back or west end of the car was hidden between the staves of

steel, he ignores the testimony of his own client, Kelley, who testified that after he had removed a few of the sheets of steel to where he could get in between the side wall of the car and the staves of steel, that he went back to the back end of the car eight or ten times during daylight for the purpose of loosening either the nails in the sheet of steel where they were nailed to the 2 x 6, or where the bottom edge of the sheet had become wedged into the floor, and he had to pry it loose. Certainly after he had removed, as the evidence shows, some twenty sheets of steel, and had made eight or ten trips back into the back end of the car, he could see whether the 2 x 6 was extending across that car or not. It was a large piece of timber, and he was in there in daylight, and working pulling the nails out of the piece of timber, and it is incredible that any contention should be made that he could not see this support.

Finally, in desperation, counsel for Petitioner, for the first time advanced the idea, at the bottom of page 45 of his brief, that the jury could believe that Head *loosened* some of the supports and not all of them, but that he did loosen enough of the supports to make it possible for the remaining supports to give way, and thus cause the accident.

In the first place, there is no allegation in plaintiff's pleadings claiming that Head loosened the supports, but on the contrary, he alleges in Subdivision E of Paragraph 4 of his trial petition, at page 30, that the supports which had been attached to said tank staves to keep them from falling, *had been removed from same*, and again further on in that same paragraph,

he alleges Head failed to warn plaintiff that *he had removed the supports from said tank staves*. There is not a line anywhere in plaintiff's petition even hinting at a claim that Head had loosened any of the supports, on the contrary, the claim is that he had removed them.

In the second place, there is absolutely no testimony on which the jury could find that what Head did had loosened the supports. Either he removed them, or he didn't remove them. The jury, if they found that he removed some of them, has no evidence on which to base a finding that the removal of some of them loosened the remaining supports.

The claim that the supports had been weakened by Head is without any evidence in the record to support it. The burden would be upon the Petitioner to show by evidence that what Head did do caused a weakening of the supports, that Head knew that they were weakened, and failed to warn Kelley of that weakening. There is absolutely no evidence to support a finding that Head knew he had weakened any of the supports. The evidence showed that for several hours in the afternoon, while Kelley was working in there, that he was lifting up on the sheets of steel at the front and letting them drop so as to pull the sheets of steel loose from where it was nailed at the back end of the car; that on other occasions the bottom end of the sheets at the back had become wedged into the floor, and it was necessary for him to pry them loose. All of this necessarily had a twisting effect on the 2 x 6 at the back of the car to which the sheets were nailed. How could the jury say from the evidence whether

the loosening or weakening of the support was due to what Head did or whether it was due to what Kelley did. The evidence does not make it clear as to which was responsible, and since the burden would be upon the Petitioner to prove by a preponderance of the testimony that what Head did was responsible for the weakening of the supports, or loosening of the supports, then he has failed to discharge that burden, and no verdict of negligence could be rendered against Respondent.

There is another and rather serious objection to this idea of counsel for petitioner, and that is that Petitioner relies very largely in his brief upon the claim that Head had straightened up the sheets of steel so as to make them stand more nearly on edge, and that the danger from it was not apparent to an inexperienced man. If the support at the back was merely loosened or weakened, according to Kelley the sheets of steel were still nailed to that support. If they were nailed to that support, then how on earth could Mr. Head, alone and unaided, without pulling those nails out, straighten up the sheets of steel?

PROPOSITION III

ANSWERING SUBDIVISION "C" OF SECTION VI OF PETITIONER'S BRIEF, pp. 47-49

The evidence was insufficient to justify submission to the jury the issue of negligence on the ground of Head's ordering the work done at night, knowing the light was inadequate and the steel unsafely stacked, and to support a jury finding on such issue; and the Honorable Circuit Court of Appeals for the Fifth Circuit did not err in so holding.

STATEMENT AND ARGUMENT

Petitioner's witness, Head, testified that he made a contract with Wimberley to finish unloading this car. His testimony as to the terms of the contract is as follows:

"Q. What did you tell the contractor with reference to what you wanted him to do?

"A. I told him I wanted him to finish unloading the car that I had started, that I was going to unload another one, and I wanted it finished that day, and to continue working until he did finish it.

"Q. All right, what happened after that? What happened after you had the conversation with Mr. Wimberley? Did he undertake to unload the car?

"A. Yes sir. He went to work unloading, went and got his truck and men, went to unloading it."
(Rec. p. 105.)

Wimberley does not deny the making of the contract for the unloading.

It will be seen from the foregoing that the very inception of the arrangement and the contract between Head, as representative of the Respondent, and Wimberley, the independent contractor was that Wimberley was to finish unloading the car, and that he was to finish unloading it that day, and to continue working until he did finish it.

The fact that Head went back later during the day, either at 4:00 o'clock in the afternoon, as Kelley testified, or at 7:00 or 7:30 in the evening as Head testified, and insisted on the contract being carried out and the work finished that day, is not in and of itself negligence nor does it constitute any interference with the independent contractor. It is, we believe, settled law in this state, that an employer has a right to exercise such control over an independent contractor as is necessary to secure performance of the contract according to its terms, and to accomplish the results contemplated thereby without thereby creating the relationship of master and servant so long as the employer does not destroy the employee's power of initiation, nor undertake to control the employee in the means and manner of the performance of the work.

R. E. Cox Dry Goods Company vs. Kellog, 145 S. W. 2d 675.

Davis vs. General Accident Fire and Life Insurance Corp., 127 S. W. 2d 526.

Carter Publications, Inc., vs. Davis (C. C. A.), 68 S. W. 2d 640 (W. of E. refused).

Lone Star Gas Company vs. Kelley (Tex. Comm. App.), 46 S. W. 2d 656.

According to testimony, the contract was that Wimberley was to finish unloading the car that day, and to continue working until he did finish it. Head's insistence or order that he carry out his contract did not constitute an interference with the independent contractor such as would create the relation of master and servant. The most usual test for determining whether the relation of master and servant or independent contractor or contractee exists is whether the contract authorizes the contractee to supervise and control the details of the work as distinguished from the results.

Furthermore, in order to sustain this ground of negligence we think it was necessary for petitioner to show by the evidence that Head knew that the work was being done without lights or that the lights were inadequate. Head may have thought that at the time he ordered the work to be done that it would be done in the dark, but still in order to hold the Appellant liable as for a breach of duty, it is necessary to be shown that at the very time the work was being done that Head had some character of notice that there were no lights or that the lights were inadequate.

As to the matter of the unsafe stacking of the steel, this, of course, depends on the testimony of Head that prior to Kelley's going to work that he had torn out the supports to which the steel sheets were attached, both at the front and at the back, and that after doing so he straightened up what had already been torn loose from the back end. In that connection, Head testified as follows:

"Q. Any man with ordinary eyes could see that the stuff was in a dangerous condition, as you have described it there, is that right,

"A. After I tore the supports loose, crating, I straightened up what had already been torn loose from the back end, I straightened them up, took them off. When they wasn't used to unloading it would not. * * * A man that wasn't experienced wouldn't notice it being set too straight. The staves were set too straight up and down."

It will be noticed that Head's statement that this was a dangerous condition was qualified by a statement that an experienced man would have noticed it. There was absolutely no evidence to show that Head knew or had any information that Kelley was not an experienced man. If he had been an experienced man, according to Head, he would have noticed that condition. In the absence of some evidence bringing the knowledge home to Head that Kelley was not an experienced man, we think that, since Kelley was a mature man, tendered to do this work by an experienced trucking contractor, that Appellant had the right to assume that he was competent and experienced, and was under no duty to warn him of the claimed unsafe stacking of the steel, and the ordering of Kelley, even with the knowledge that the steel was not safely stacked, to do the work, did not create a liability in the absence of proof that to the knowledge of Appellant's representative Kelley was inexperienced.

PROPOSITION IV

ANSWERING SUBDIVISION "D" OF PARAGRAPH VI OF PETITIONER'S BRIEF (pp. 49-56)

If the supports from the staves had been removed, such a condition was open and obvious, and there was, therefore, no duty to warn petitioner of the removal, and the failure to do so would not constitute negligence, and the Circuit Court of Appeals correctly so held.

STATEMENT AND ARGUMENT

In the beginning of the argument under Subdivision "D" Petitioner makes the statement that "since the evidence showed that the crating and supports were in between the staves, which would hide the supports and make it a hidden and latent defect that they had been loosened in the middle and behind," etc., we submit that there is no evidence sustaining this statement.

We suppose that Petitioner bases this statement upon the testimony which was set out by him on pp. 34 and 35 of his brief. The statement omits the question and answer immediately following the end of the quoted portion, which are as follows:

"Q. That is what you call crating?

"A. Crating and supports." (Rec. p. 136.)

This evidence clearly demonstrates that the only crating and supports in or about these sheets of steel, or staves of steel, were the 2 x 4 or 2 x 6 at the back or west end of the car to which the sheets were nailed, and a 4 x 4 at the top in front or toward the center to

which the sheets were nailed, and a 4 x 4 at the bottom in the front end of the staves, nailed to the floor. The question and answer above quoted makes clear that what the witness meant by the words "crating and supports" referred to these pieces of timber, and them only. We are surprised that counsel again is insisting on the statement that the supports were in between the staves, which would hide the supports, because he made that argument in the Circuit Court of Appeals, and Justice Waller called his attention to the state of the record, and in his first supplemental brief, filed following submission, he admitted his error in that respect.

As to the matter of the sheets of steel hiding the 2 x 6 at the back, Petitioner ignores the testimony of his own client showing that during the afternoon he removed some twenty sheets of steel and that he went in between the sheets of steel and the back end of the car eight or ten times in daylight, and according to his testimony, he pulled the nails out which fastened the sheet of steel to the 2 x 6 at the back on several occasions, and on other occasions he had to go in back there and pry the sheets of steel where the bottom part of the sheet at the back end had become wedged into the floor. Certainly after the sheets of steel had been removed sufficiently for him to go back in between there to pull out nails and pry up the sheets of steel at the back, there would be nothing hidden about the 2 x 6 across the back, and he either saw it, or could have seen it without any difficulty whatever. There was, therefore, no hidden supports which he was not thoroughly familiar with, and saw, or could have, in

the exercise of ordinary care observed long prior to the time that the accident occurred.

On page 51 of Petitioner's brief, he makes the argument that Kelley should have been warned as to the latent and extraordinary danger brought about by the Appellant's representative, Head, "in loosening the supports." As heretofore called to the attention of the Court, there is no evidence showing any loosening of the supports, and we ask the Court to consider the statement and argument in relation to this matter under our Proposition II in answer to Petitioner's Subdivision "B" of Paragraph VI of his argument.

PROPOSITION V

ANSWERING SUBDIVISION "E" OF PETITIONER'S BRIEF, pp. 56-63

The evidence was insufficient to support a finding by the jury that the work was inherently dangerous, and the Circuit Court of Appeals correctly so held.

STATEMENT AND ARGUMENT

In considering the matter of whether the work was inherently dangerous: All that this work involved was the removing from a freight car and the loading onto a truck of sheets of steel weighing from 185 to 285 pounds, each (or according to the estimate of Appellee, 500 pounds). Regardless of which estimate of the weight is correct, it may be admitted that the sheets of steel were heavy and that if one or more of them fell upon a man that injury could be inflicted. But

this does not make the work inherently dangerous, for the same thing is true of the handling of any kind of heavy material.

It may be contended that because the supports had been removed from the steel that this rendered the work inherently dangerous. It is a matter of common knowledge that in unloading heavy machinery and materials that have been shipped in box cars and flat cars it is frequently necessary—in fact almost always necessary—to remove some or all of the supports which immobilized the article and prevented it from shifting during shipment. It is also a matter of common knowledge that, in the process of unloading such heavy material it is almost always necessary to remove the braces and supports which immobilized it during shipment. If the removal of the supports, or crating that is usually and customarily placed around heavy machinery and other heavy materials when it is shipped renders the unloading inherently dangerous, then the unloading and handling of almost any character of heavy and bulky freight would become inherently dangerous.

The evidence of Appellees' witness Head and of Appellant's witness Hobson, shows without dispute that had the unloading of these sheets of steel been handled by the Appellee in the usual and ordinary way this accident would not and could not have happened. According to their testimony, in the usual and ordinary method of handling tank steel, there was no necessity for the workmen to go between the sheets of steel and the side of the car; here the thing which cause the acci-

dent was that Appellee did not unload the steel in the ordinary and usual way but went between the steel and the side of the car and that as a result of his unusual method of doing the work the steel fell and injured him. If Appellee had simply stayed at the front of the steel sheets and pulled the sheets out one by one toward the front of the car, this injury could never have occurred.

An automobile is a heavy piece of machinery and when it is loaded on a freight car for shipment ordinarily supports and blocks are put around it to prevent it from shifting in the process of shipment. These supports and blocks normally have to be removed in order to unload it from the railroad car. Would it be contended that the removal of these blocks and supports would render the unloading of an automobile inherently dangerous work? The same is true of practically all character of heavy machinery such as tractors, pumps, harvesting machinery, telephone and telegraph poles, railroad cross ties, heavy structural steel, and thousands of other types of heavy materials. The work of unloading and handling such heavy materials, if done with ordinary care, is not necessarily dangerous. Of course, the law of gravity still obtains, and men are not always careful and injuries occur, but this does not mean that such work is inherently dangerous.

The loading and unloading and handling of heavy materials of all kinds constitute a large part of the commerce of the United States. To hold that in every case where heavy material is being unloaded that the

removal of the crating, or blocks, or staves, or supports, makes the work inherently dangerous, would impose an almost intolerable burden on commerce and the business of the country requiring that all of the hundreds of thousands of men engaged as stevedores, freight handlers and truck men should each be specially skilled. The unloading of this steel is not inherently more dangerous than the unloading of any other heavy material, yet according to Appellee's contention, based on the claimed inexperience of Appellee in unloading tank steel, there would have to be created a class of specialists in the unloading of every particular class of materials—there would be specialists in unloading pianos; specialists in unloading automobiles; specialists in unloading tank steel; specialists in unloading irrigaton pumps; specialists in unloading tractors; specialists in unloading oil well casing; specialists in unloading structural steel—and if perchance the consignee of some heavy freight employed a trucking contractor to unload some one of these classes and kinds of heavy material, he would at his peril have to see that the trucking contractor sent out a specialist in the unloading of that particular kind of material, or else have the work declared inherently dangerous and held liable for the negligence of the independent contractor.

We have not been able to find a case where the question of whether the unloading of tank steel was inherently dangerous has arisen, but there are a number of illustrative cases which we think establishes the principle applicable, and that under those decisions

this particular work could not be classed as inherently dangerous.

To the average man, the handling of dynamite is considered highly dangerous work, yet in the case of *Joseph R. Foard Company vs. State of Maryland to use of Goralski, et al.*, 219 Fed. 827, where a ship owner employed a stevedoring firm as an independent contractor to load dynamite on the ship and through the negligence of the independent contractor, an explosion occurred, the Circuit Court of Appeals for the Fourth Circuit had this to say:

"The rule that responsibility is on the independent contractor alone does not apply when at the inception of the undertaking a man of ordinary reason should know that in the natural course of things the work would certainly or probably result in injury to another, unless some distinct and definite precautions be taken, although the details of the work to be done with due care; as, for example, guarding a hole dug in the street, or protecting buildings close to blasting operations from rocks which would probably strike them, or protecting a wall when excavating by it. But the exception does not extend to work which could be surely performed with safety upon the sole condition that due care be exercised in the details of its execution.

"Applying this rule, the Munson Company is not liable. Loading dynamite, gasoline, gunpowder, naphtha, and other inflammable or explosive substances is necessary to commerce and is not a nuisance. The *Ingrid* (D.C.) 195 Fed. 596, and authorities cited; *Ingrid v. Central Railroad Co.* (2nd Circuit), 216 Fed. 72, 132 C. C. A. 316.

There was no distinct and definite precaution to be taken, so as to make sure that due care in the details of the work would make it safe. It was not disputed that dynamite may be loaded with perfect safety, if adequate care be taken against concussion and heat. There was no danger of either, except from the details of the work, and therefore the independent contractor alone was liable."

In the case of *Marvin Briggs, Inc., vs. N. Y. Public Library, et al.*, 20 N. Y. S. (2) 977, the Supreme Court for the Appellate Division, Second Department, held that the removal of a heavy boiler from a truck for the purpose of placing it in a building was not inherently dangerous.

In the case of *Smith vs. Humphreyville, et al.* (C. C. A.), 104 S. W. 495 (writ of error refused), the Court of Civil Appeals for the First District had before it the question of whether the work of raising the roof of a brick building in which bricks were caused to fall by reason of one end of an iron anchor being left fastened in the end of a joist, was not intrinsically dangerous so as to make the owner liable for injury where the work was being done by an independent contractor.

In the case of *Missouri Valley Bridge & Iron Company, et al., vs. Ballard* (C. C. A. O.), 116 S. W. 93, the Texas Court of Civil Appeals for the Second District had before it the question as to whether the work of sinking caissons which resulted in one of the independent contractor's employees suffering from caissons' disease was held not to be inherently dangerous,

but was such a work as could be done without probable injury to any one except in the event of negligence in the manner of doing it.

In the case of *Allen vs. Public Building Co., et al.* (C. C. A.), 84 S. W. (2) 506, the Dallas Court of Civil Appeals held that the work of laying brick and constructing a brick building some 150 feet above the ground was not inherently dangerous so as to render the owner liable for injuries to the employee of a sub-contractor.

In the case of *Lone Star Gas Company vs. Kelly* (Comm. of App.), 46 S. W. (2) 656, the Court held that the laying of a pipeline for gas was not so intrinsically dangerous as to render the gas company liable for injuries to the servant of the independent contractor.

In the case of *Dixon, et al., vs. Robinson, et al.* (C. C. A.), 276 S. W. 770, it was held that excavation preparatory to the erection of a new building was not inherently or intrinsically dangerous even though the contract included the removal of old brick foundation walls in which the contractor used dynamite for blasting.

In the case of *Holt vs. Texas New Mexico Pipeline Company* (C. C. A. 5th), 145 Fed. (2) 862, this Court held that the dynamiting of rocks in a barren rural section was not inherently dangerous so as to render the pipeline company liable to the servant of an independent contractor who in leveling a ditch following a blast was injured by striking an unexploded dynamite cap.

See also:

Swift & Co. vs. Boling, (C. C. A. 4th), 293 Fed. 279.

McHugh vs. National Lead Company, 60 Fed. Supp. 17.

Ford vs. Commercial Motor Freight, 14 N. E. (2) 354.

Scales vs. Llewellyn, 90 S. E. 521.

O'Neil vs. American Radiator Company, et al., 43 Fed. Sup. 543.

Humble Oil & Refining Company vs. Bell (C. C. A.), 180 S. W. (2) 970 (writ of error refused), 181 S. W. (2) 569.

The last mentioned case held that the rule as to liability of the contractee in the having done of inherently dangerous work did not apply in favor of servants of an independent contractor engaged in the work but applied only to third persons.

None of the cases cited by Petitioner are in point as we understand the law.

Petitioner apparently relies very largely on the case of *Cameron Mill & Elevator Company vs. Anderson*, which he incorrectly cites as being reported in 87 S. W. 282, whereas the correct citation is 81 S. W. 282, for the Supreme Court opinion, and 78 S. W. 8 for the Court of Civil Appeals opinion. In that case, the proof showed that Cameron Mill & Elevator Company, by permission of the City Council, caused to be dug in one of the streets of the city of Fort Worth adjacent to its elevator plant, a hole some 34 feet long, 28 feet

wide and 12 or 14 feet deep, for the purpose of installing some underground storage tanks for fuel oil. Anderson, a boy 13 years of age, attempted to ride his bicycle on the street about 9:00 o'clock at night, and fell into the excavation and was injured. There were no lights or barricades or signals about the excavation, and the street was dark. Cameron Mill & Elevator Company had contracted with McFadden, as an independent contractor, to do the work. The Supreme Court, in affirming the judgment of the Court of Civil Appeals, made the following statement:

"We were of opinion when we granted the writ of error that the company was liable for McFadden's negligence, and that the Court of Civil Appeals did not err in so holding. We are still of that opinion. The question is ably discussed in the opinion of Mr. Justice Speer, who spoke for the Court in the case, and the conclusion is amply supported by the numerous authorities cited by him. It would therefore be a profitless task to enter upon any extended discussion of the question."

A reading of Justice Speer's opinion for the Court of Civil Appeals, 78 S. W. page 8, shows that he predicated his holding that Cameron Mill & Elevator Company was liable entirely upon the proposition that the digging of an excavation in a public street imposed on the person having the excavation made a non-delegable duty to protect the public in the use of the thoroughfare. As stated by Judge Speer:

"Appellant cannot cause to be dug in a public street an excavation, the necessary effect of which is to create an obstruction or defect which would

render the street dangerous for travel, unless properly guarded, without being liable for such injuries as are the direct result of such work. In such case it is no defense that the work was in the hands of a competent, independent contractor."

Justice Speer then follows with the citation of various cases, such as *Thomas vs. Harrington*, 54 Atlantic 286, where the Supreme Court of New Hampshire in considering a case involving injuries by falling into an excavation in the public street, said,

"Such an excavation in a street is a nuisance, because it renders public travel dangerous, and makes extra precautions necessary for the protection of travelers."

Justice Speer also cites the case of *Robbins vs. Chicago*, 4 Wall. 657, 18 Law Ed. 432. A case of an unguarded area in a public street. And the case of *McCarrier vs. Hollister*, 89 S. W. 862, involving an excavation in one of the principle streets of the city of Sioux Falls. In that case, the Supreme Court of South Dakota held that:

"The contract in the case at bar contemplated an excavation in one of the principle streets of the city of Sioux Falls. The work contracted for could not be done without creating a condition in the public thoroughfare from which mischievous consequences might reasonably be expected to arise unless preventive measures were adopted. * * * Where the work contemplated by the contract is of such a nature that public safety requires something more to be done, than the mere construction

of the improvement, we think the owner of the property owes a duty to the public to see that proper safeguards are taken, and that, where such precautions are not taken, he should not escape liability for resulting injuries."

Justice Speer cites a number of other cases, all of them involving similar situations.

It is, therefore, apparent that the danger with reference to which both the Court of Civil Appeals and the Supreme Court were writing in the Cameron Mill & Elevator Company case involved cases of obstructions or excavations in a public thoroughfare, as to which the owner causing the excavation to be made owed a nondelegable duty to the public to see that the obstruction or excavation was guarded by sufficient barriers and lights.

In the case at bar, there is no question of the public; it is only the question of an invitee on the premises, as to whom the contractee owed only the duty of warning him against dangers which were latent and concealed.

The case of *North American Dredging Company vs. Pugh*, 196 S. W. 255, cited by Petitioner on page 57 of his brief, is clearly distinguishable on the facts. In that case, the dredging company employed an independent contractor to dredge a channel. In doing so, the company knew that it would be necessary to dump the dredged material on adjoining land. This was done, and the adjoining landowner being damaged thereby, sued. The question of furnishing a safe place to work was not involved in that case, and the work necessarily contemplated the dumping of the dredged material

on the adjoining land, even though the work was performed with ordinary care. The Court, therefore, properly held that the dredging company could not avoid responsibility for such damages as were occasioned thereby by employing an independent contractor to do the work. In the case at bar, if the work had been done in the usual and customary manner, and with ordinary care, no injury would have resulted.

In the case of *American Pacific Whaling Company vs. Kristensen*, 93 Fed. 2d 17, cited at page 60 of Petitioner's brief, the facts were that the whaling company had a harpoon cannon which got out of order. They employed an independent contractor to repair the cannon, and he did so in a defective manner. The defect in the cannon was not observable, and the portion repaired was subjected to great strain because of the great force with which the gun recoiled on firing. No matter how careful the operator of the gun might be, the defects in the gun stem rendered the use of the gun dangerous. In the case at bar, there was no hidden, concealed defect, but the defect was open and obvious to ordinary observation, and if Kelley had performed his work in the usual and customary manner, and with ordinary care, he would not have gone in between the sheets of steel and the side wall of the car, and would not have been injured.

In the case of *Johnson vs. J. I. Case Threshing Machine Company*, 182 S. W. 1089, cited by Petitioner on page 62 of his brief, the facts were that the threshing machine was operated on the highway with a defective spark arrester on the engine, permitting sparks to

escape and set fire to haystacks on land adjoining the highway. No matter how carefully the machine was operated, due to this defective spark arrester, sparks were likely to escape and to cause injury to adjoining property. We think this is clearly distinguishable from the case at bar.

In the case of *Grinnell vs. Carbide & Carbon Chemicals Corporation*, 276, N. W. 535, cited by Petitioner at page 62 of his brief, the chemical company had sold and had installed a gas stove and tanks supplying it, to be filled with an explosive and inflammable gas. The court held that the chemical company could not avoid liability for injuries sustained by the owner of the boat in an explosion as a result of the defective installation on the ground that the representative was an independent contractor, since the nature of the installation imposed a duty on the chemical company, which it could not delegate to a representative. We think the facts of that case distinguish it as an authority in this case.

PROPOSITION VI
ANSWERING SUBDIVISION "F" OF SUBDIVISION
VI OF PETITIONER'S BRIEF, pp. 63-82

The undisputed testimony establishing that Petitioner either assumes the risk or was guilty of contributory negligence, the verdict and judgment should have been for the Appellant.

STATEMENT AND ARGUMENT

The Honorable Circuit Court of Appeals for the Fifth Circuit, having found that Petitioner had failed to make out his case, did not specifically pass upon the question of whether Petitioner assumed the risk or was guilty of contributory negligence as a matter of law. If this Court arrives at the same conclusion as the Honorable Circuit Court of Appeals, it is, of course, unnecessary to consider the question of assumed risk or contributory negligence. Since, however, Petitioner has devoted some twenty pages of his brief to the discussion of this question, we think it is not improper that we reply to his contentions.

Before making our reply, we deem it proper to call to the Court's attention, certain statements of fact in Petitioner's argument, which we believe are not supported by the record.

In the first sentence, at page 65, Petitioner argues that Kelley testified that he believed or presumed that it was safe to remove the steel, or else he would not have been requested to do so by the Appellant's representative, Head. We have heretofore, under our pre-

liminary statement, set out the testimony with reference to this matter, and request the Court to here consider that statement as supporting our contention that there is no evidence to show that Kelley was ever requested by Appellant's representative, Head, to unload this steel, but on the contrary, his positive testimony was that the orders given to him were given to him by Wimberley, his employer.

In the last paragraph on page 66, Petitioner argues that "it is to be observed that the danger attendant to unloading materials from boxcars is sufficiently dangerous that rules have been formulated by the American Railway Association as to how boxcars may be safely unloaded."

There is no evidence in the record that any rules have been formulated by the American Railway Association as to the safe unloading of boxcars. If the statement is based on the quotation from *Anderson vs. Southern Railway Company*, it may be called to the attention of the Court that the opinion in that case shows that the rules introduced related to the loading of poles on flat cars, and the requirements as to standards and safety precautions, etc., and there is nothing in that opinion with reference to the unloading of objects from boxcars.

On page 81 of Petitioner's brief, in the fourth line from the top, he makes the statement:

"Of course, the real proximate cause was the support having been loosened to such an extent by Head that it broke, causing the stave to fall, etc."

There is no proof in the record that what Head did loosened the support, on the contrary, Head's testimony is that he removed the support. This contention, we think, is adequately answered in previous portions of our argument.

Petitioner in his argument cites the case of *United Production Corporation vs. Chesser*, 107 Fed. 2d 850, and copies from the opinion in that case. If the Court will read the first report of that case on the first appeal in 95 Fed. 2d 521, it will find that on the first opinion in the case, 94 Fed. 2d 788, and the opinion on motion for re-hearing, 95 Fed. 2d 521, where the evidence indicated Chesser knew of the breaking of the first gooseneck and the manner of the attachment of the safety chain onto the second gooseneck, the Court had no hesitancy in declaring that under those circumstances Chesser was guilty of contributory negligence. On the second appeal, the evidence showed that Chesser knew nothing about the breaking of the first gooseneck or how the second gooseneck was secured by safety chains.

It may also be noted that in that case the production company contracted to furnish the tools and appliances, including the gooseneck, to the independent contractor for the performance of his work. The gooseneck was defective and broke, causing injuries to Chesser. In the case at bar, the Respondent did not agree to furnish anything, and didn't furnish anything to the independent contractor, and the evidence shows that petitioner knew the condition of the steel and its lack of support, and the danger of its falling.

The case of *Hanson vs. Ponder*, 3 S. W. 2d 426, cited by Petitioner in his brief at page 65, is distinguishable from the case at bar because there was no showing in that case that the injured employee had had any opportunity to see or observe the danger. The accident occurred due to a sudden breaking of the standards. In the case at bar, the fact that the steel had no supports to prevent it falling was perfectly obvious, and Petitioner had worked in the car for several hours in daylight, and could and must have seen the lack of support.

The case of *Motejl vs. Greenwood, et al*, 138 Pac. Rep. 2d 216, cited on page 67 of Petitioner's brief, is likewise clearly distinguishable from the case at bar. The facts of that case were that Plaintiff was preparing to unload logs from a truck and crawled under the truck to make certain attachments used in unloading. The driver of the truck, an employee of defendant, Greenwood, knowing the logs had been disarranged while in transit, and knowing Plaintiff was under the truck, unloosed the binder chain holding the logs in place, thus permitting them to roll off and strike plaintiff. The binder chain was unloosed while plaintiff was under the truck, and without warning to him, and he had no knowledge it had been loosed. In the case at bar, the removal of the supports was perfectly open and obvious to observation by petitioner over the period of several hours, and the danger of the steel falling was perfectly apparent to petitioner when he went in between the steel and the side wall of the car.

The case of *Phillips Petroleum Company vs. Hooper*, 154 Fed. 2d 743, cited by Petitioner at page 69 of its

brief, is, we think, distinguishable on the facts. Hooper was truck driver for a construction company, and drove his truck into one of the Phillips filling station to have some gasoline poured on a load of asphalt he was carrying. He had warned the operator of the station on former occasions when doing this same kind of work to turn off the gas stove in the station. On the occasion in question the stove was not turned off, and it ignited the gasoline fumes, causing an explosion injuring the plaintiff. The evidence showed without dispute that on the day of the accident the weather was warm, and Hooper did not know or have reason to suspect that the gas stove was burning. In the case at bar, Petitioner knew that the steel was standing on edge without supports, and that there was nothing to prevent it from falling on him when he went in between the steel and the side wall of the car. While, as the Court said, in the Phillips Petroleum Company case, Hooper was not required to anticipate that the premises were dangerous, yet Petitioner in the case at bar could not shut his eyes to visible dangers that were patent and obvious.

In the case of *McAfee vs. Travis Gas Corporation* 153 S. W. 2d 442, cited by petitioner at page 69 of his brief, Plaintiff an employee of Federal Petroleum Company, at the request of an employee of the gas corporation, went to its pipeline to point out some leaks. While doing so, Woods, the employee of the gas corporation, struck a match causing an explosion in which Plaintiff was injured. The facts showed that while McAfee knew that the gas was leaking, he had no reason to anticipate that Woods, an experienced employee of the gas com-

pany, would do so dangerous a thing as striking a match near to said leak.

In the case of *American Stores Company vs. Murray*, 87 Fed. 2d 894, cited by Petitioner at page 69 of its brief, the American Stores Company had a store with some steps, and there was a loose riser on the steps, which caused the plaintiff to fall. The opinion shows that the defect in the riser on the step was not patent, open or obvious, as was the case with the condition of this steel and its lack of supports in the case at bar.

In the case of *Holmes vs. Ginter Restaurant*, 54 Fed. 2d 876, cited by Petitioner at page 69 of its brief, a customer fell on the slippery floor of the restaurant. The slippery condition of the floor was known to the proprietor, and there was sufficient evidence to raise the issue that it was not known to the plaintiff, who had just entered the restaurant. In the case at bar, Kelley had been working in the car removing this steel for some hours in broad daylight before the accident, and necessarily knew the situation as to whether the steel had any supports, or whether it was standing unsupported and free to fall.

In the case of *Gulf C. & S. F. Ry. Co. vs. Gascamp*, 69 Tex. 545, 7 S. W. 227, cited and quoted from in Petitioner's brief at pages 70-71 of his brief, the evidence showed that Gascamp attempted to cross a bridge constructed by defendant on a portion of the public road crossing its right-of-way; that he knew the bridge as not in good repair, but that it was crossed by travelers in wagons and on horseback, and was the only practicable crossing for him in the direction he was

traveling. The Court held that if a traveller has no other convenient way, the mere fact that he takes the chances of a known danger and attempts a passage, is not controlling proof of his negligence. We do not think this case applicable to the case at bar.

In the case of *Memphis Cotton Oil Company vs. Gardner*, 171 S. W. 1082, cited and quoted from at pages 72-79 of Petitioner's brief, we think the quotations clearly show that it is distinguishable from the case at bar. In that case, the relationship of master and servant existed between the plaintiff and the cotton oil company, whereas in the case at bar, the relationship between Petitioner and Respondent was that of an invitee upon the premises of the owner or controller. In the second place, the quotation from the opinion shows that Gardner was injured in a short time after beginning the work, and without knowledge on his part of the danger caused by the insecure stacking of the sacks of meal. The last four or five lines of the quotation in that case, at the bottom of page 77, is to the effect that the evidence in the case tended to show that Gardner had not been working in removing the sacks for not exceeding thirty minutes when the accident occurred. In the case at bar, Petitioner had been working in the car in broad daylight for several hours prior to the accident, and therefore had ample opportunity to see and observe the danger.

Furthermore, the last sentence on page 78 of Petitioner's brief, in the quotation from that opinion, it is affirmed by the Court that the Appellee was not shown to have conducted himself out of the usual and

ordinary way of performing the work, whereas in the case at bar, the evidence is without dispute that the usual and ordinary way of removing the sheets of steel was to pull them from the front out toward the center of the car, and that the going in between the sheets of steel and side wall of the car was not the usual and ordinary method of unloading. The undisputed testimony was that if the raising of the sheet of steel and dropping it down did not extract the nail at the back end, that the usual and customary way was for the workman to go over the tops of the steel and pull the nail out at the back.

The case of *Herndon vs. Halliburton Oil Well Cementing Company*, 154 S. W. 2d 163, is inapplicable to the present situation, because respondent does not here seek to apply the rule of assumed risk, but rather the doctrine of *volenti non fit injuria*, as recognized in the case of *United Production Company vs. Chesser*, 95 S. W. 2d 521, and *Southern Pacific Ry. vs. McCready, et al.*, 47 S. W. 2d 673.

The case of *City of Beaumont vs. Silas*, 200 S. W. 2d 695, cited by Petitioner at page 79 of its brief, is clearly distinguishable in that first, the relation of master and servant existed between the City of Beaumont and Plaintiff. The opinion does not show how long the plaintiff had been in the room, and handling the sacks at the time he was injured, and the opinion does not undertake to discuss in any way the facts, which it was claimed raised the issue of contributory negligence in that case.

The case of *Texas & Pac. Ry. Co. vs. Day*, 197 S.

W. 2d 332, cited at page 80 of Petitioner's brief, is, we think, distinguishable in that it was a crossing accident, and the plaintiff claimed that after one train passed he waited and looked for another train, and then started to cross and was struck. It is apparent from plaintiff's testimony in that case that he did look and exercise some care for his own safety, and the Court held that this made an issue for the jury. In the case at bar, Petitioner worked all afternoon in day-light handling the steel, and necessarily discovered that the steel was standing on edge and was without support. Knowing these facts he deliberately and for no adequate reason, put himself in the position of danger by going between the steel and the sidewall of the car, which was not the usual and customary method of handling steel in a car of this kind.

The case of *Shubert vs. City of Dallas*, 190 S. W. 2d 721, cited by Petitioner at page 81 of his brief, was a case where the city was improving a street in front of Plaintiff's residence, and left a pile of dirt in her path from her house to the street, over which she fell while going out to her car in the dark. We think the case is distinguishable because the use of a highway or street or sidewalk by a traveller, even with knowledge of its being obstructed, is not conclusive of negligence due to the fact that one travelling upon a street or sidewalk has the right to presume that the obstructions have been removed, or if not, that barriers or lights will be placed around them to give warning. Such a rule does not pertain as to private premises. In the second place, the evidence failed in that case to show actual knowledge by plaintiff of

the existence of the obstruction, whereas in the case at bar, Kelley could not have avoided knowing of the lack of supports for the steel, and the possibility of its falling.

Whether we consider that assumed risk is not available as a defense except as between master and servant, and not as between the servant of an independent contractor and the contractee, yet under the rule announced by this Court in *United Production Corporation vs. Chesser, et al* (C. C. A.), 95 Fed. (2) 521, we think Appellant here was entitled to the defense of assumed risk under the ordinary meaning of "take upon oneself" as expressing the idea that the person injured has voluntarily taken on himself the risk and known danger which he could have avoided. In other words in such a situation the maxim *Volenti non fit injuria* is applied.

See also *Southern Pacific Company vs. McCreedy, et al* (C. C. A. 9th), 47 Fed. (2) 673, as relating to the application of this principle, and as related to the matter of contributory negligence, as a matter of law, we call the Court's attention to the following situation in the record:

The only witness who testified to the removal of these supports was Appellee's witness J. O. Head, who testified (Rec. pp. 106-107) that before Kelley went to work that he, Head, had torn out the supports and braces on this steel, leaving it free. He elaborated somewhat on his testimony on cross examination, testifying that he took out the two timbers at the front end of the steel (Rec. p. 130), and that when he did

so it was perfectly obvious that nothing was holding the front of the staves, and that anybody could see that.

That he also tore out the 2 x 6 or 2 x 4 at the back end of the staves (Rec. p. 133), that he crawled over these staves and took the 2 x 6 out of the back or west end of the box car and pulled out all of the nails that attached the staves to that 2 x 6. (Rec. p. 134.)

Appellee testified on direct examination that at the time of or just immediately before the accident, that he had gone to the back end of the car to pull the nail out of the sheet of steel, and was coming to the front end of the car when the steel fell and caught him. (Rec. p. 49.)

That in unloading the steel after he went to work that the way they got the steel out, he and the Mexican would put hooks in the holes in the sheets at the front end and pull them out and drag them over to the door. That the way they broke them out and pulled out the nails was to put the hook in a hole close to the bottom in the front end and pull the sheet of steel up and break it loose at the other end of the box car and drag it out. That there was a nail driven into the 2 x 4 timber at the back end of the car. That he saw that situation when he started to work and knew the 2 x 6 was back there, and that he had to handle the sheets from the front. (Rec. pp. 64-65.) That some of the sheets were nailed to the 2 x 4 at the back and some were not and that he saw those that were nailed and saw some that were not nailed in the trips that he made back there in broad daylight. (Rec. p. 67.) That for several hours there in the afternoon as he worked he could see that

some of the sheets were nailed to the 2 x 4 and some of them were loose. (Rec. p. 68.)

Appellant's witness, Wimberley, testified that, after he made the trade with Head to unload the car that he went over with Kelley to the car when he started to work and that the timbers in front of the steel were still there, and Kelley and the Mexican helper pulled one of them out with a winch line, and pried up the one on the front with a bar. (Rec. p. 185.)

That the way they, Kelley and the helper, got the steel loose from the cross piece at the back end of the car, they had hooks and would pull the sheet of steel out and pull it loose from the nail. (Rec. p. 186.) After Wimberley testified to this Appellee Kelley did not take the stand and deny his testimony.

If Head's testimony is not true, and Appellee's and Wimberley's version is correct, then the steel at the time Kelley went to work was still fastened to the timber at the back end, or west end of the car, and there would be no support in the evidence for a finding by the jury that the supports had been removed from the steel.

If, on the contrary, Head's testimony is accepted as true, then Kelley's evidence as to the reason for his going back into the back end of the steel immediately before it fell on him is wholly untrue. He said that the reason he went back there was to pull out the nails. If, as Head says, the nails and supports had already been pulled out, then Kelley has no believable explanation for going back in there, and is in the attitude of voluntarily putting himself in danger for no reason at all.

Appellee cannot have his cake and eat it too; he cannot rely on Head's testimony to establish liability for the removal of the supports and failure to warn Kelley of that fact, and yet excuse Kelley of contributory negligence by saying that he went back to pull the nail out when, according to Head, no such nail was there.

On the matter of contributory negligence, the evidence, without dispute, showed from both Appellee's witness Head and Appellant's witness Hobson, that the usual and customary way of taking the sheets out of the car was for the workman to take their hooks and raise the front end of the sheet up about a foot and come down on it, and that would break it loose from where it was nailed at the back end of the car, and then simply pull it out. (See Hobson's testimony, Rec. pp. 172-173.) Head testified that, the ordinary way of getting the staves out would be to take the hooks at the front end and put them in the hole in the chine (or flange) and that sometimes a man would have to get on top of the staves and break the nail (Rec. p. 136), and ordinarily in unloading that kind of steel it would be unnecessary to go back toward the back end of the car. (Rec. p. 136.)

If we accept Appellee's testimony and Wimberley's testimony as true, these sheets were still nailed to the 2 x 4 or 2 x 6 at the back end of the car, and the ordinary and customary way of unloading these sheets was to either raise up the front end and lay it down and break the nail loose at the back end, and then pull the sheet of steel out, and that if they could not get

the nail out in that manner the proper, ordinary and usual way was to go over on the top of the steel sheets and pull the nail out at the back.

If we accept Head's version that he had already removed the timber at the back and the nails fastening the sheets at the back to the timber, then the only thing necessary for Kelley and his helper to do was to put their hooks in the holes in the flange at the front end and pull the steel out, and there was no necessity, or occasion, for either of them to go to the back end of the car, and between the sheets of steel and the side wall of the car.

It is true that Kelley testified that, during the afternoon when they were unloading the car, that he, or his helper, had gone back in there several times; that the flange at the back end was sometimes stuck into the floor of the car, and one of them would have to go back and dig it up (Rec. pp. 66-67); but on the occasion immediately before the accident he did not claim that he went back there because one of the sheets of steel was stuck in the floor but said he had gone back there to pull the nail out of the sheet of steel. (Rec. p. 49.)

It will also be borne in mind that so far as the lighting conditions are concerned, that Kelley testified that when he went back to the car to work around 9:00 or 9:30, that he himself trained the light on the truck to shine in the car, and that he went in and unloaded two or three sheets and was continuing his work despite the fact that he knew he did not have adequate light. (Rec. pp. 81-82. See also Rec. p. 78.)

If the light was inadequate and that rendered the work dangerous, Kelley admittedly knew it. If despite that, he continued to work he was not exercising ordinary care for his own safety.

It will also be borne in mind that Wimberley testified, and it was not denied by Kelley, that he told Kelley that whenever he got a few sheets of steel out to push it over to be sure it did not fall on him. (Rec. p. 189.) While Kelley denied that he was warned he does not claim or testify that Wimberley did not give him said instructions or that he undertook in any way to obey these instructions, and if Head's statements are true that all the nails had been removed from this steel, there was nothing on earth to prevent Kelley from shoving the steel back so that it would not fall on him, but this he did not do.

We submit that evidence establishing that Appellee voluntarily assumed the risks incident to this work, including the fact that the steel was without supports and that the lighting was inadequate and the fact that the undisputed evidence showing his contributory negligence, leaves the verdict and judgment for Appellee without support in the testimony.

United Production Corporation vs. Chesser, et al. (C. C. A. 5th), 94 Fed. (2) 790, 95 Fed. (2) 521.

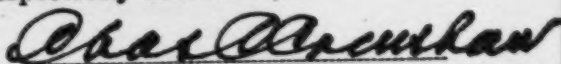
Southern Ry. Co. et al. vs. Edwards (C. C. A. 5th), 44 Fed. (2) 526.

Anderson, et al., vs. Southern Ry. Co. (C. C. A. 4th), 20 Fed. (2) 71.

CONCLUSION AND PRAYER

We believe that the foregoing authorities and statement of facts demonstrate the decision and judgment of the Honorable Circuit Court of Appeals for the Fifth Circuit was correct, and that the petition for writ of certiorari should be denied.

Respectfully submitted,



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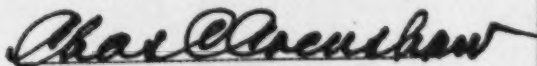
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A copy of the foregoing brief has been furnished to the Honorable John J. Watts of Odessa, Texas, attorney for Petitioner.



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No. 211

IN THE

Supreme Court of the United States

W. R. KELLEY, *Petitioner*

VS.

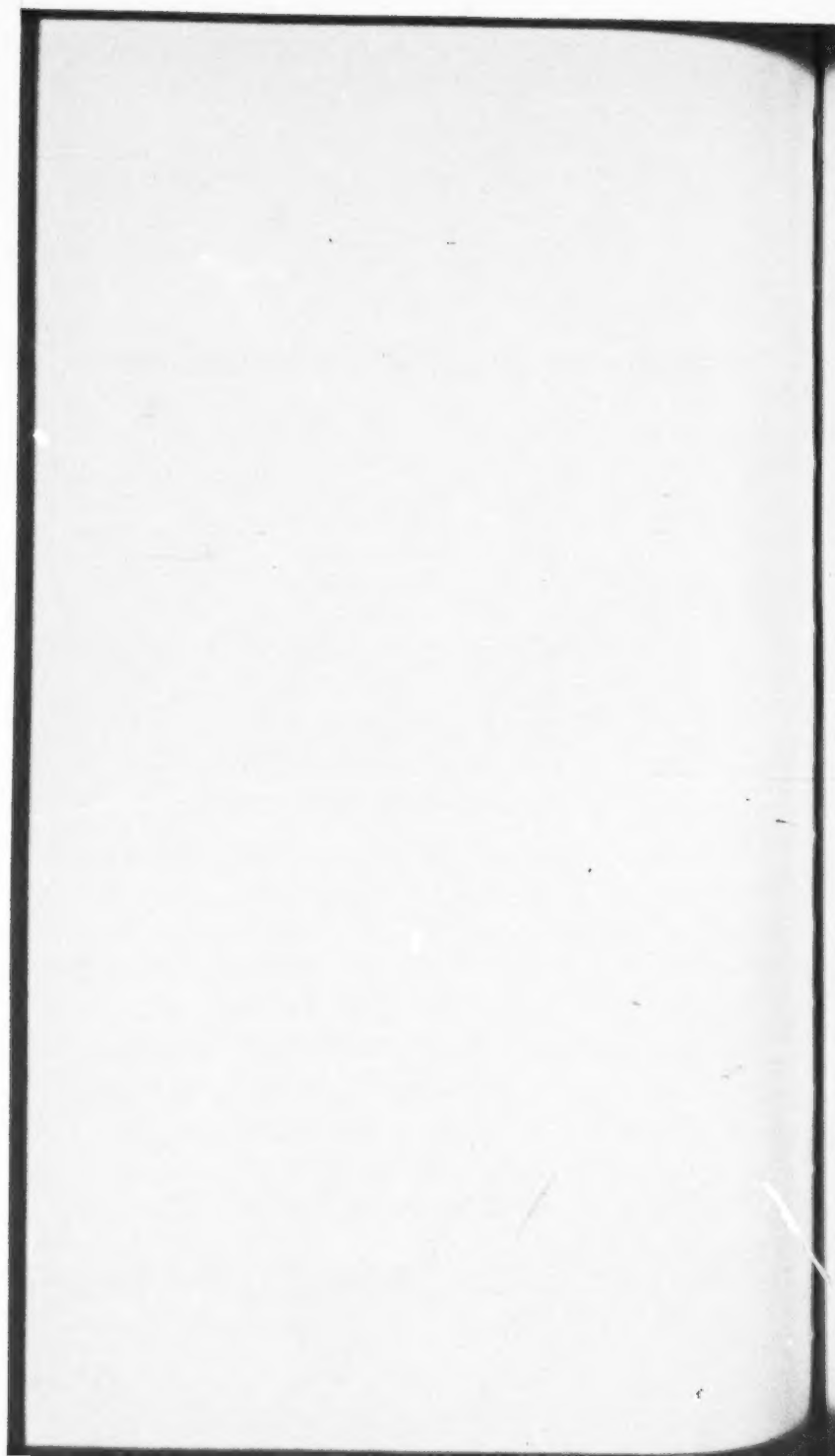
UNION TANK AND SUPPLY COMPANY, *Respondents*

**MOTION TO FILE
MOTION FOR REHEARING**

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No. 211

IN THE

Supreme Court of the United States

W. R. KELLEY, *Petitioner*

VS.

UNION TANK AND SUPPLY COMPANY, *Respondents*

MOTION FOR REHEARING

Now comes the petitioner in the above entitled and numbered cause and moves the court to permit him to file this motion for rehearing after the period provided by law has expired and as grounds therefor, would respectfully show unto the court as follows, to-wit:

That since the filing of the Petition For Certiorari has in this cause appellant's counsel have discovered that a new decision has been rendered styled *Ashby vs. Luttrell*, the decision having been published in the advance sheet of the South Western Reporter on September 7, 1948, same appearing in 213 S. W. 2d Pg. 77; that in said decision the Eastland Court of Civil Appeals has rendered an

opinion which we believe will materially change the opinion of this Honorable Court in that this presents a proposition of law not heretofore urged before this Honorable Court and demonstrates that the opinion of the Circuit Court of Appeals is clearly erroneous wherein the court stated:

"He, therefore, saw and knew everything that could have been told to him, that if the sheets were straightened up and swung over toward the north wall of the car, and weight, configuration and size were such that if unsupported they would be bound to fall. There was nothing then in the work he was doing and the situation under which he was doing it which was not as fully known to him as to Head, nothing in the work that was inherently dangerous if it was done with reasonable care for the safety of the worker."

In the *Ashby v. Luttrell* case supra, after the Eastland Court had held in the first opinion that the plaintiff could not recover because the danger was open and obvious, or to use the Court's language on motion for rehearing, the Court said:

"Such holding was based upon the idea that the evidence showed conclusively that the dangers incident to cleaning the machine were open and obvious to everyone, regardless of experience, and required no warning by appellants. The evidence is susceptible to the interpretation that Luttrell was not given any warning of the danger of having his hand crushed if he failed to hold the scraper with both hands flat on the table. It cannot be said that such danger was open and apparent at all."

In another portion of the opinion, the Court said:

"It is readily conceivable that such an employee as Luttrell might not know that when the scraper struck a hard piece of dough on the roller while holding the scraper and his hands in such a position, that his left hand might be thrown between the rollers. This is quite a different thing from knowing and realizing merely that if he got his hand between the rollers it would be crushed. The same idea was expressed by Judge Strong in *Hotel Dieu v. Armendarez*, 210 S.W. 518."

The court further cited the case of *City of Waco v. Dool*, 254 S.W. 353, in which case an employee who knew that it was dangerous to handle dynamite returned to the spot where he had lighted a fuse on a stick of dynamite after it had failed to explode within the usual time and was injured by a delayed explosion caused by a slow burning fuse. There was evidence that Dool did not know that some fuses burned more slowly than others; that the defendant failed to warn him; that if he had been so warned he would have waited longer before going to the ditch and would thereby have avoided the injury. The court held that the question of whether the defendant was negligent in failing to so warn said employee was for the determination of the jury.

The court quoted from 35 Am. Jur. 576 as follows:

"Comprehensively stated, the rulings of the cases are to the effect that if a person employs another to do work of a dangerous character or in a dangerous

place, and the employee, because of youth, ignorance or inexperience, fails to appreciate the danger, it is a breach of duty and negligence on the part of the employer to expose him thereto, even with his consent, unless the employer first gives him such instruction, caution and warning as will enable him to comprehend the danger and do his work safely with the exercise of proper care on his part, citing the Texas cases of *Missouri Pacific Ry. Co. v. Watts*, 64 Tex. 568; *Galveston, H. & S. A. R. Co. v. Garrett*, 73 Tex. 262, 13 S.W. 62; *Chicago Anderson Pressed Brick Co. v. Reinneiger*, 140 Ill. 334, 29 N. E. 1106, 33 Am. St. Rep. 249; *Texas & N. O. R. Co. v. Gardner*, 29 Tex. Civ. App. 90, 69 S.W. 217."

We have heretofore quoted in our original Petition For Certiorari that it is the settled law in Texas that an invitee such as Kelley was entitled to this type of warning and Judge Holmes, in his dissenting opinion, clearly so holds. The evidence set out by the court shows, in the footnotes of the original opinion, on Page 814;

"They had nailed the steel. It is back in the car, and I had gone back to pull this nail out of this sheet of steel, coming to the front end of the car. Before I got to the front the steel fell and lodged me against the opposite side of the car."

There is absolutely no testimony showing that any warning of any character was ever given to Kelley. Certainly Kelley was entitled to be told that pulling the nail out of the sheet of steel at the back as he *had been doing might eventually result in the entire stack falling. There is absolutely no evidence showing that he was given such a warn-*

ing that would make him, as an inexperienced employee, comprehend and appreciate his danger. Therefore, the court obviously erred under the above holding in holding that the danger was obvious and apparent to Kelley.

Petitioner would further show this Honorable Court as grounds for granting this motion to file this motion for rehearing out of time that he has discovered a case by the Supreme Court of the United States, to-wit: *Donatto Filippin v. Albion Vein Slate Company*, 63 Law Ed. 76. In the above case this Honorable Court granted a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment of said court which affirmed a judgment of the District Court for the Eastern District of Pennsylvania in favor of the defendant in a personal injury case. This Honorable Court in an opinion by the great Mr. Justice Pitney reversed and remanded the proceedings of the lower courts upon two propositions, one of which was an erroneous charge upon the question of contributory negligence. This was a case very similar to the facts in this case and in which the grounds of negligence alleged were the failure to furnish a reasonably safe place for the work to be performed and the failure to warn plaintiff of the latent dangers of the work and the dangerous method of doing the work and specifically, that plaintiff was directed to do the work in a particular manner under orders and instructions of the defendant's foreman. The evidence showed that the plaintiff was at work in an open quarry and that the usual method of work with which the

plaintiff was familiar was that after a block of slate had been blasted out it was raised by crowbars and by wedges of wood or iron placed beneath it, in order that chains might be placed about it to which the hoisting tackle is made fast. To use the language of the Court:

"In case the block is small, the wedges are placed by the workman's hand, it not being necessary to insert them beyond the edge of the block. In case of large blocks, the wedges are put in by hand so far as this can be done without placing the hand beneath the block, and then a stick or the handle of a tool is employed in order to push the wedge farther in, the workman being thus protected from injury in case the stone should happen to slip or drop.

The court further said:

"On the occasion in question a large block had been blasted out and was being raised in order that chains might be put about it. Plaintiff was assisting, and had inserted a wedge as far as he could push it without putting his hand beneath the stone, but it was necessary that the wedge should be pushed farther in, and he, being afraid that if he did this with his hand the block might fall upon his arm, told the foreman or superintendent that he wanted to get something with which to push the wedge. Instead of consenting, the foreman ordered him to 'go ahead, go ahead,' in obedience to this he put his right hand beneath the block, when, with a sudden movement, the block came down on his arm and crushed same."

The Supreme Court held the trial court's instruction to the jury was erroneous in the following language:

"But this was neutralized, and the jury probably led astray, when, in the supplementary instruction, they were told, in effect, that if, when plaintiff obeyed the foreman's order by putting the wedge beneath the heavy block of slate with his hand, he fully appreciated the attendant danger and had sufficient time to consider, and if the situation was such as would have made a reasonably prudent man disobey the order, and he went ahead in spite of the dangers known to him and apparent, he was guilty of contributory negligence. The effect of this was to bar a recovery if the plaintiff knew of the attendant danger, although he did not know or have reason to suppose that the danger was inevitable or imminent; that is, immediately threatening. We suppose it hardly could have been a point in dispute that plaintiff knew that the operation of pushing the wedge beneath a large block of slate with his hand was dangerous, for he was familiar with the work, knew what safeguard was customarily taken against this danger, expressed a fear of it upon the particular occasion, and requested time to get an implement to be used for his safety according to the custom. It was at this precise moment, according to the testimony, that the foreman or superintendent told him to 'go ahead, go ahead;' and under the Pennsylvania decisions he was entitled to rely upon the judgment and order of his superior if the work was not inevitably and imminently dangerous; this is, threatening immediate injury upon the particular occasion. The jury very reasonably might conclude that neither plaintiff nor the foreman believed or had reason to believe that the work was inevitably and imminently dangerous; but if it was not, he was entitled, under the Pennsylvania decisions, to hold his employer re-

sponsible for the consequences of what he did under peremptory orders of the foreman, although he (the plaintiff) fully appreciated the general dangers, had time to consider, and went ahead notwithstanding."

This case is clearly in point with the fact situation in the case at bar. This decision demonstrates the duty of this Honorable Court to follow the action of the great Court that constituted the Supreme Court of the United States at the time that the brilliant Mr. Justice Pitney delivered this opinion *since it clearly shows that this Honorable Court has a duty in a case involving this exact point of law to grant the application for certiorari and to review the horribly wrong decision, the plainly palpable errors made by the majority opinion of the Fifth Circuit in which a \$32,000.00 judgment has been taken from a man whose bowels must forever empty from an opening in his stomach. The Fifth Circuit in the majority opinion is plainly wrong when they say:*

"As to the first exception, there is no evidence whatever that Head, who for defendant employed Wimberly, plaintiff's employer, in any manner interfered with the contractor in the discharge of his work. The fact that he told Wimberly that the steel must be gotten out that night was not an interference with the contractor in the doing of the contracted work. It was merely the expression of a desire which was neither unlawful nor unreasonable."

The evidence of Head shows, from Page 106 of the Record, that he went by at 7:30 P. M., when it was getting

dark and after the work had already been contracted and then, to use his exact language:

"I stopped by to see how they was getting along, and they lacked a load of staves having them out, and I told them to go ahead and finish them.

Q. About what time?

A. As well as I remember around 7:00 or 7:30

Q. Was it dark then?

A. Beginning to get dark in the car, yes, sir.

Q. Did they have any lights in the car?

A. No, sir, we didn't have no lights."

This, we respectfully submit, amounts to an order to go ahead even though the work was dangerous, and was rendered far more dangerous by the order of Head to do it in the nighttime. In fact, the Courts of Texas, whose law must control here, the accident having occurred in Texas, have many times held that such orders constitute negligence. Another case which has not been presented to this Honorable Court or to the Fifth Circuit concerning this matter is that of Texas Hardwood Co. et al v. Moore, 235 S.W. 630. In the Moore case the plaintiff was told by the man in charge of the work to push the log car so that it would return to the log yard, and was injured. This was held to constitute active negligence. In another Texas case not heretofore quoted before either court, Dillingham v. Cavett, 91 S.W. (2) 868, the manager of an ice company placed a block of ice into a machine which was

running and told the youthful employee, "you push them in and I will take them out." The boy did as directed and received a serious injury and this was held to *constitute active negligence*.

In the case of *Page v. Schlortt, et al*, 71 S.W. (2) 866 the facts were that the plaintiff was ordered, with other employees, *to get upon a scaffold*. The scaffold fell and the Court held that such an order constituted *an affirmative act of negligence*. Such a holding by the majority is clearly contrary to Section 410 of the Restatement of the Law of Torts, another Section of the law which has not heretofore been quoted either to this Honorable Court or to the Fifth Circuit, wherein said Section says:

"The employer of an independent contractor is subject to the same liability for bodily harm caused by an act or omission committed by the contractor pursuant to the orders or directions negligently given by the employer, as though the act or omission were that of the employer himself."

Under Comment (a), it is stated:

"The rule stated in this Section is an application of the broader rule that one who either intentionally or negligently directs another to do or omit to do an act, is subject to the same liability for the consequences of the other's act or omission as though it were his own. This Section deals only with the liability for the conduct of an independent contractor. The broader rule, however, is equally applicable to a servant or agent or to any other person who acts or refrains from action in obedience to the will of

another. This section deals with the liability for negligence in directing work to be done which is dangerous in itself or dangerous because of the manner in which it is directed to be done. The broader rule includes liability of one who intentionally causes a third person to inflict intended bodily harm upon another.

Under Comment (b) Extent of rule, it is further stated in the Restatement of the Law of Torts:

"This Section deals only with liability of an employer who does not intend that the contractor shall cause bodily harm to any other person, but who either employs a contractor to do work which, no matter how carefully done, involves an unreasonable risk of bodily harm to others to whom he owes a duty to exercise care, or who employs a contractor to do work which could be safely done but for the fact that he directs the contractor to do it in a manner involving such risk. The liability is based upon the fact that the employer has been negligent in directing his contractor to do work which is dangerous in itself or in the manner in which it is done."

Who can say that directing a contractor to work in the nighttime without lights in a car which the employer of the contractor knows presents a false appearance of safety to an inexperienced employee knows that he is in danger in that Head admits having removed the supports and crating and knew that some of the sheets of steel had already fallen in the car, was guilty of negligence in directing this contractor to do the work without lights in the nighttime under such circumstances. To our mind the

proposition is unheard of and when reasonably considered, shows how right Mr. Justice Holmes was in his dissenting opinion when he pointed out that there was liability in this case, not only in the failure to warn but on account of the interference of the company with the contractor's work.

WHEREFORE, it is respectfully submitted that this motion for leave to file the attached motion for rehearing should be granted and upon being granted that this Honorable Court should set aside the judgment of the majority of the United States Circuit Court of Appeals for the Fifth Circuit and that the judgment of the United States District Court in and for the Western District of Texas, Pecos Division, should be affirmed. In this connection your petitioner would show that this motion is filed in good faith and not for the purpose of delay.

Petitioner further represents that this motion is made in good faith and not for the purpose of delay.

Respectfully submitted,

JOHN W. WATTS and DORSEY HARDEMAN

By.....

P.O. Box 1031, Odessa, Texas

Attorneys for the Petitioner

A true and correct copy of this motion for leave to file the attached Motion For Rehearing has been furnished counsel for the adverse parties.

.....
Attorneys for Petitioner

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No. 211

IN THE

Supreme Court of the United States

W. R. KELLEY, *Petitioner*

vs.

UNION TANK AND SUPPLY COMPANY, *Respondent*

To the Honorable Fred, Vinson Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States.

MOTION FOR REHEARING

Now comes the Petitioner in the above entitled and numbered cause and files this his motion for rehearing and moves this Honorable court to set aside his judgment rendered on October 11, 1948, refusing Petition For Certiorari in this cause, and moves the court to grant this motion for rehearing and as grounds therefor, shows that this Honorable Court erred in refusing to grant said petition under the law as expressed in *Ashby v. Luttrell*, 213 S.W.

2d Page 77. And as expressed in the decision discussed in the motion for leave to file this motion for rehearing.

WHEREFORE, petitioner prays that this motion for rehearing be granted; that the Petition For Certiorari be granted and that upon final hearing that the majority opinion of the United States Circuit Court of Appeals for the Fifth Circuit be reversed and the judgment of the United States District Court in and for the Western District of Texas, Pecos Division, be affirmed.

Respectfully submitted,

.....
DORSEY HARDEMAN
McBurnett Building
San Angelo, Texas

.....
JOHN W. WATTS
P. O. Box 1031
Odessa, Texas

A true and correct copy of this motion for rehearing has been furnished counsel for the respondent.

By.....
Of Counsel for Petitioner.